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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1067

REGENCY ELECTRONICS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Regency Electronics, Inc. (the "Company"), requests that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit rendered in the above case on December 3, 1973, and October 3, 1975.

OPINIONS BELOW

The decision of the Regional Director of the National Labor Relations Board (the "Board") which set aside the results of the first representation election at the Company's manufacturing plant is unreported. A copy is reprinted at page 1 of the Appendix ("App.") which has been separately filed with this petition. The decision of the Board which

adopted the Regional Director's decision and ordered that a second election be conducted is unreported. (App. 17)

The decision of the Regional Director which upheld the results of the second election at the Company's plant is unreported. (App. 21) The decision of the Board which adopted the Regional Director's decision is reported at 198 N.L.R.B. No. 87 (1972). (App. 36) The decision of the Board which ordered the Company to cease and desist from refusing to bargain with the certified union, one of the Respondents herein, is reported at 200 N.L.R.B. No. 88 (1972). (App. 39)

The opinion of the Court of Appeals which denied the Company's petition for review and granted enforcement of the Board's cease and desist order is reported at 499 F. 2d 1129 (7th Cir., 1973) (App. 53) (*"Regency I"*). The order of the Court of Appeals which stayed further proceedings and remanded the case to the Board for further findings is reported at 499 F. 2d 1134 (7th Cir., 1974). (App. 64)

The Supplemental Decision of the Board's Administrative Law Judge is unreported. (App. 66) The Supplemental Decision and Order of the Board which adopted the decision of the Administrative Law Judge is reported at 215 N.L.R.B. No. 157 (1974). (App. 82)

The opinion of the Court of Appeals which enforced the Board's supplemental order is reported at 523 F. 2d 522 (7th Cir., 1975) (App. 84) (*"Regency II"*).

JURISDICTION

The first judgment of the Court of Apepals is dated December 3, 1973, and was entered on January 29, 1974. By order dated March 14, 1974, the Court of Appeals stayed further proceedings and remanded the case to the Board.

The second judgment of the Court of Appeals is dated October 3, 1975, and was entered on November 14, 1975. The petition for rehearing filed by the Company was denied on October 30, 1975, and this petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c) (1975).

QUESTIONS PRESENTED

1. Did the Board contravene the mandates of the Administrative Procedure Act and the decisions of this Court by setting aside the results of a representation election based solely upon a pre-existing, but unpromulgated, general rule?

2. Alternatively, should enforcement of a Board order be denied if the order was founded on a mechanical use of Board precedent and if the Board did not independently consider the facts of the case or otherwise supply any reasoned basis for its order?

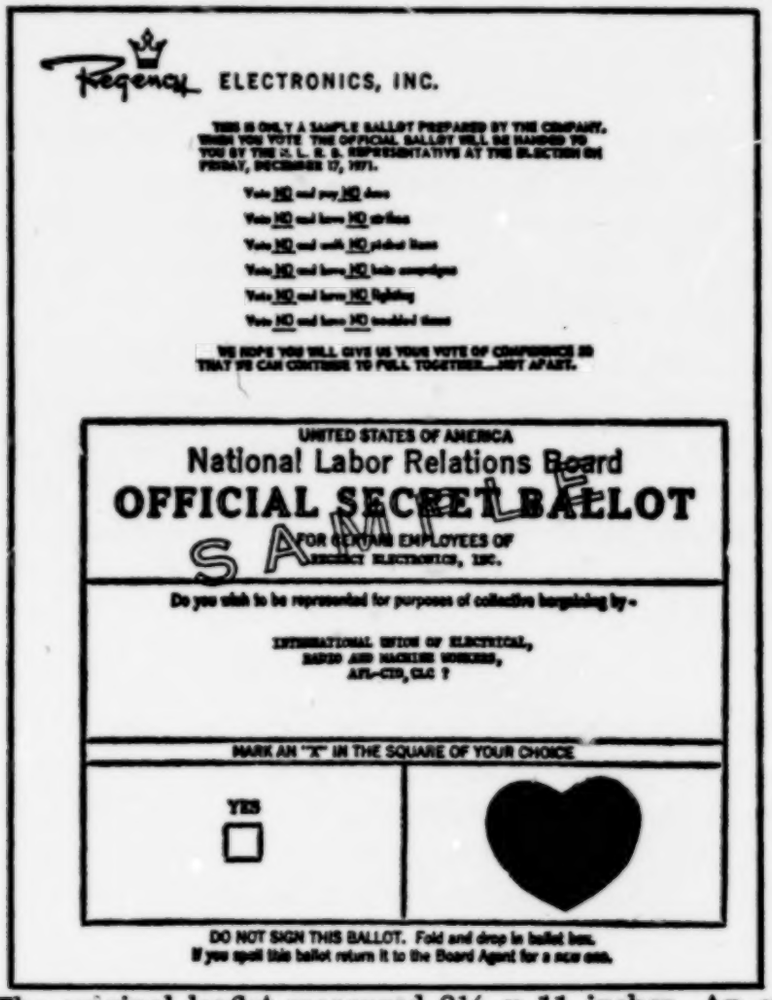
3. Should the Board have set aside the results of a subsequent representation election in which the union prevailed by only 21 votes, if at the time of the election, the union was continuing to benefit from the fact that approximately 50 of the 245 voting employees held charter membership cards which contained improper waivers of initiation fees?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§141-187 (1975) are set forth in the separate Appendix at page 99. The relevant provisions of the Administrative Procedure Act (the "APA"), 5 U.S.C. §§500-706 (1975) are set forth in the separate Appendix at page 93.

STATEMENT OF THE CASE INCLUDING BASIS FOR FEDERAL JURISDICTION

The Company manufactures electronic equipment at Indianapolis, Indiana. On December 17, 1971, the Board conducted an election to determine whether the Company's employees wished to be represented for purposes of collective bargaining by the Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (the "Union"). During the election campaign, the Company distributed the following leaflet:



Regency ELECTRONICS, INC.

THIS IS ONLY A SAMPLE BALLOT PREPARED BY THE COMPANY. WHEN YOU VOTE THE OFFICIAL BALLOT WILL BE HANDED TO YOU BY THE N. L. R. B. REPRESENTATIVE AT THE ELECTION ON FRIDAY, DECEMBER 17, 1971.

Vote NO and pay NO dues

Vote NO and leave NO strikes

Vote NO and walk NO picket lines

Vote NO and leave NO hate campaigns

Vote NO and leave NO fighting

Vote NO and leave NO troubled times

WE HOPE YOU WILL GIVE US YOUR VOTE OF CONFIDENCE SO THAT WE CAN CONTINUE TO PULL TOGETHER....NOT APART.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

SAMPLE

FOR CERTAIN EMPLOYEES OF REGENCY ELECTRONICS, INC.

Do you wish to be represented for purposes of collective bargaining by -

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC ?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES ☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

(The original leaflet measured 8½ x 11 inches. An exact reproduction appears at page 7 of the separate Appendix.)

A majority of the employees (117 to 104) voted against the Union. The Board set aside the results of this election and ordered that a second election be held (App. 19) solely because the Company's leaflet purportedly violated a general rule announced by the Board in the adjudicatory proceeding of *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270 (1954). (App. 3-4, 19) The *Allied* rule prohibits the marking of any Board document, or any reproduction of a Board document, except in limited situations. Although consistently applied as a general rule, the *Allied* rule has never been promulgated pursuant to the rule making provisions of the APA, 5 U.S.C. §553 (1975). (App. 96)

A second election was conducted by the Board on March 24, 1972, and the Union received a majority of the votes cast (133 to 112). The Company objected to the second election alleging, *inter alia*, that the Union had improperly waived its initiation fees during the election campaign. (App. 23-24) The Board overruled all of the Companys' objections without a hearing and certified the Union as the collective bargaining representative of the Company's employees in the appropriate bargaining unit. (App. 36-38)

The Company petitioned the Court of Appeals for the Seventh Circuit for a review of the Board's order that the Company bargain with the Union and the Board cross-applied for enforcement of its order.[1] The jurisdiction of the Court of Appeals was invoked under Sections 10(e) and (f) of the NLRA, 29 U.S.C. §160(e) and (f) (1975). (App. 102-104)

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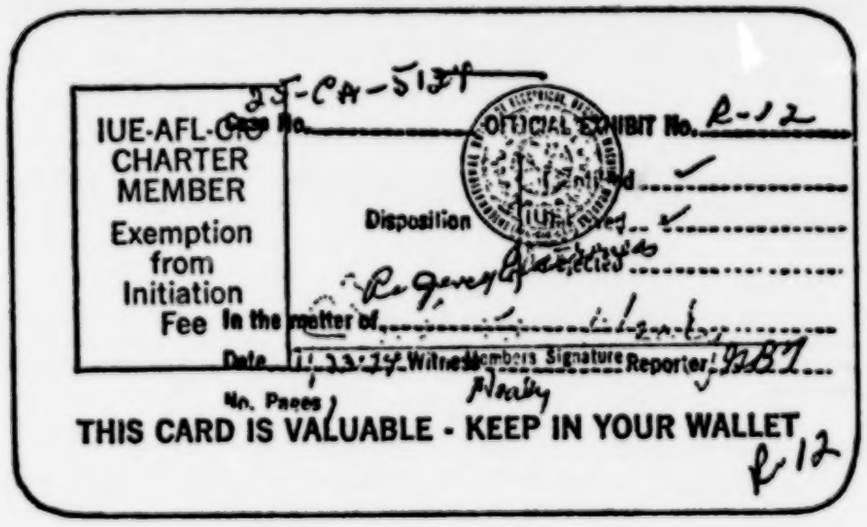
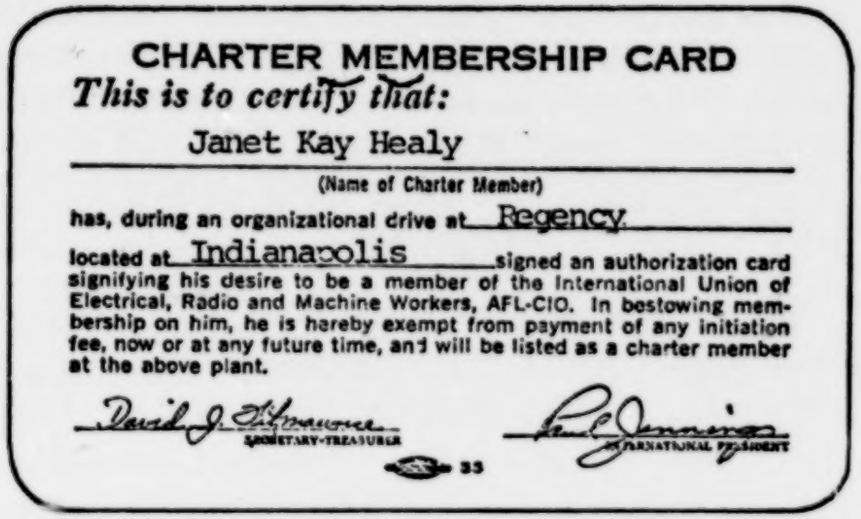
1 In order to seek judicial review of the Union's certification, the Company refused to bargain with the Union. The Board's subsequent order to cease and desist from refusing to bargain with the Union was the agency's first final order which could be judicially reviewed.

The Court of Appeals denied the Company's petition for review and granted enforcement of the Board's order even though the *Allied* rule had not been promulgated pursuant to the APA and even though the Board had based its order on a mechanical use of Board precedent. Although these Board errors were argued by the Company to the Court of Appeals, they were not discussed in the Court's opinion. (App. 53)

While the Company's petition for rehearing was pending before the Court of Appeals, this Court rendered its decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). Because the Company's fourth objection to the second election had raised issues identical to those in the *Savair* decision, the Court of Appeals stayed further proceedings and remanded the case to the Board for the purpose of conducting a hearing on the Company's fourth objection. (App. 64-65)

During the subsequent hearing before the Board's Administrative Law Judge (the "ALJ"), the uncontroverted evidence established that as many as 50 (523 F.2d at 524) (App. 87) of the following "charter membership cards" were distributed to the Company's employees by the Union during the campaign prior to the first election:





CHARTER MEMBERSHIP CARD

This is to certify that:

Janet Kay Healy

(Name of Charter Member)

has, during an organizational drive at Regency

located at Indianapolis signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.

David J. Thrasher
SECRETARY-TREASURER

Paul Jennings
INTERNATIONAL PRESIDENT

IUE 33

(Facsimiles of the card appear at App. 75, 86-87)

Although the ALJ found the Union's use of the charter membership cards constituted "misconduct" (App. 78), he nevertheless recommended that the Company's fourth objection be overruled. (App. 80-81) He did so on the basis of one question and answer contained in a Union leaflet distributed to all employees over three months after the Union had bestowed charter memberships on approximately 50 employees.[2] (App. 77-78) The Board adopted the ALJ's recommended order. (App. 82-83)

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2 The ALJ's decision was also based upon the Board's cutoff date policy which at that time precluded the consideration of any conduct prior to the first election except as background. The Board admits, and subsequent to the ALJ's decision held, that the cutoff policy should not be applied to Savair violations. Gibson's Discount Center, 214 N.L.R.B. No. 22 (1974). However, the Board took the position in this case, which was accepted by the Court of Appeals in Regency II, that the ALJ's error of law in honoring the cutoff policy did not preclude adoption of his recommended order. The Board argued that one basis for the ALJ's decision was that he gave full weight to all of the evidence, including the charter membership cards, but still found the Union's conduct unobjectionable under Savair. The Company's continued challenge to such an interpretation of the ALJ's decision is not material to this petition. The undermining of Savair in Regency II is even more egregious if it is presumed the Board's cutoff policy was not applied to the facts of this case.

The Court of Appeals granted enforcement of the Board's supplemental order. The Court of Appeals did not discuss how the Union could be absolved of its admitted *Savair* violations even though at the time of the second election, it was continuing to derive the benefits accruing from its improper waiver of initiation fees.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision of the Court of Appeals in *Regency I* is in Direct Conflict with Applicable Decisions of this Court.

In *Regency I*, the Court of Appeals sanctioned the Board's historical refusal to follow the rule making provisions of the APA.[3] The Court of Appeals also sanctioned the Board's mechanical use of Board precedent which, in the absence of a validly promulgated rule, allowed the Board to enter its order in this case without independently considering the facts and without supplying any reasoned basis for its order.

The practical effect of *Regency I* is that the Board will continue to disregard election results based upon unlawful rules on which the public has never had an opportunity to comment and of which the public has never been notified. Clearly, settlement of these issues by this Court is in the public interest in order to protect the secret ballot process by which employees select or reject a union as their collective bargaining representative.

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3 In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), this Court noted that:

"The Board has never utilized the [Administrative Procedure] Act's rule-making procedures." (394 U.S. at 765 n.3)

Four years later, in Bell Aerospace Co. Div. of Textron, Inc. v. NLRB, 475 F.2d 485 (2nd Cir., 1973), *modified*, 416 U.S. 267 (1974), Judge Friendly asked the Board's counsel to advise the court in writing whether the Board "had ever engaged in the rule-making on substantive matters." In reply, the Board cited only two occasions. (475 F.2d at 495 n.14)

A. The Board Cannot Adopt a General Rule, Such as the *Allied* Rule, Without Complying with the Administrative Procedure Act.

Whenever an administrative agency exercises its quasi-judicial power, as in this case, at least two steps are involved in its deliberative process. One, did the respondent commit a given act? Two, did the act violate some law? Administrative agencies need not decide the second question, however, if the agency, in the exercise of its quasi-legislative power, has previously promulgated, pursuant to the APA, a rule of general applicability which applies to the facts under consideration. General rules thus can serve to streamline the deliberative process because in an appropriate case, the agency need only determine whether the respondent committed a certain act. The fact that the act, if committed, violates the law has already been determined by rule making. Agency precedents, on the other hand, merely aid the agency in determining whether a certain act violates some law. Agency precedents cannot be used to avoid the necessity of deciding the second step.

Whether to proceed by rule making or by the use of precedents rests in the informed discretion of the agency. Only the agency knows whether it is practical to devise a general rule to fit all situations. If an agency decides to proceed by ad hoc litigation, utilizing precedents, its decision will be upheld only so long as it follows the two step deliberative process. *See, NLRB v. Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 294-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947); and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

If, however, an agency does devise a general rule, it may

do so only by following the rule making provisions of the APA. *NLRB v. Wyman-Gordon Co., supra* at 765 n.4. It is only in this manner that the public interest can be served because the public is notified of the rule and given an opportunity to comment on the proposed rule before it is implemented.

This Court has consistently recognized this public interest and refused to sanction any agency rule of general applicability which has not been promulgated pursuant to the APA. In *Wyman-Gordon*, this Court was asked to rule upon the validity of the Board's *Excelsior* rule which requires employers to furnish the Board with a list of its employees' names and addresses prior to a Board conducted election. The Board had announced the rule in the case of *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966) but had never promulgated the rule pursuant to the APA. A majority of the Justices agreed that the *Excelsior* rule had been invalidly promulgated. However, a plurality of the Justices upheld the application of the rule to the Wyman-Gordon Company because the company had been presented with an order based on the *Excelsior* rule *before* it had acted in violation of the rule. (394 U.S. at 766)

The question which was not presented in *Wyman-Gordon* is what if a party is presented with a pre-existing, unpromulgated agency rule *after* it has already acted in violation of the purported rule? As the Company argued to the Court of Appeals in *Regency I*, there could be but one answer. This Court supplied that answer in *Morton v. Ruiz*, 415 U.S. 199 (1974), decided after *Regency I*.

In *Ruiz*, the respondents were Indians who had moved from a reservation to a location near the reservation. They

subsequently applied for special assistance benefits from the Bureau of Indian Affairs ("BIA"). The BIA denied the application based on a pre-existing, but unpromulgated, general rule, contained in the BIA's policy manual, limiting benefits to Indians living on, but not near, a reservation. Although the rule had been in the policy manual for a number of years, it had never been promulgated pursuant to the APA. A unanimous Court ruled that if the BIA could deny benefits to off-reservation Indians, it could only do so if a general rule to that effect was promulgated pursuant to the APA. Because the BIA had merely inserted the rule in its policy manual, this Court refused to sanction the rule. (415 U.S. at 230-36)

Wyman-Gordon, as supplemented by the *Ruiz* decision, is dispositive of this case. Both cases reflect this Court's continuing concern over the failure of administrative agencies to follow the rule making provisions of the APA. Despite *Wyman-Gordon*, the Board in this case applied a general rule which had never been promulgated pursuant to the APA. As in *Ruiz*, the unpromulgated rule was applied against the Company and its employees *after* the Company had distributed its campaign leaflet. The Board previously had announced the *Allied* rule as one to be applied in the future:

> "Upon consideration, the Board has decided that *in the future* it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this *rule*.[7]

"'[A]lthough we have chosen this decision in which to enunciate the *new rule* relating to sample ballots, set forth above, the *rule* is not necessarily retroactively applied to the facts of this case, as the altered ballot is objectionable under the principle of *Anderson Air Activities, supra.*" (109 N.L.R.B. at 1272) (footnote 6 omitted) (emphasis added)

This is a "rule" as defined in the APA:

"'Rule' means the whole or a part of an agency *statement* of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy . . ." [5 U.S.C. §551(4) (1975)] (emphasis added) (App. 94)

One year later, the Board twice confirmed that the *Allied* rule was a rule of general applicability. *Superior Knitting Corp.*, 112 N.L.R.B. 984, 986 (1955); 20 NLRB Ann. Rep. 62 (1955).

The *Allied* rule was applied as a general rule to the Company's campaign leaflet. This is evident from the following "finding" of the Regional Director which was adopted by the Board:

"The ballot set forth on Exhibit A [the Company's leaflet] is identical in size and content with the official election ballot. The *rule* set forth in *Allied Electric Products, Inc.*, 109 NLRB 1270 is therefore applicable and Exhibit A is objectionable. . . .

"[T]he Board has not modified the *Allied Electric rule.*" (emphasis added) (footnote omitted) (App. 3-4)

Unlike the *Wyman-Gordon* case where the employees' rights were only indirectly affected, the application of the *Allied* rule has resulted and will continue to result in the sweeping aside of secret ballot elections, both favorable and

unfavorable to unions.[4] This has occurred on the basis of a rule on which the public has never had an opportunity to comment and of which the public has never been notified. Had the Board followed the rule making provisions of the APA, the public could have commented on the *Allied* rule and perhaps the Board would have found it was not a repository "of ultimate wisdom." *Wyman-Gordon*, 394 U.S. at 777-78 (Douglas, J., agreeing as to the invalidity of the *Excelsior* rule but dissenting as to the result). Unless this Court directs the Board to follow the *Ruiz* decision, the Board will ignore *Ruiz* in the same manner it has consistently ignored *Wyman-Gordon.*

B. The Board Failed to State the Basis for its Order or Make Sufficient Findings.

The Court of Appeals in *Regency I* condoned a Board practice condemned by this Court in the case of *Phelps Dodge Corp. v. NLRB, supra. Phelps Dodge* established that the Board, or any administrative agency, cannot substitute

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4 *Compare, e.g.*, Superior Knitting Corp., *supra*, (election set aside because employer marked a sample ballot in employees' presence during a campaign speech) and DeVilbiss Co., 114 N.L.R.B. 945 (1955) (election set aside even though, after having marked a sample ballot, employer told employees he had not meant to infer the Board supported the employer and stated that the Board is perfectly impartial); *with*, United States Gypsum Co., 124 N.L.R.B. 1026 (1959) (election set aside because a union stuck propaganda pins, which were intended to be removed and worn, on a ballot and some of the pins were in the "Yes" box); Sharco Mfg. Corp., 110 N.L.R.B. 2112 (1954) (union's victory set aside even though other parties to the election also had distributed a marked sample ballot); Hughes Tool Co., 119 N.L.R.B. 739 (1957) (one union's victory set aside even though, as in this case, the marked sample ballot was surrounded by other propaganda and thus obviously was not an official Board document); and Tube Reducing Corp., 110 N.L.R.B. 1080 (1954).

Whatever the result of the election being set aside, be it favorable or unfavorable to a union, Mr. Justice Jackson's dissenting opinion in NLRB v. A. J. Tower Co., 329 U.S. 324 (1946) provides an appropriate reminder:

"If the only interest affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here—those employees who did not want to be represented by the union." (329 U.S. at 335)

a mechanical use of agency precedent for the second step in the deliberative process discussed above. The Phelps Dodge Corporation had discriminatorily discharged a number of employees. The Board ordered reinstatement of all the discharged employees including those who had obtained substantially equivalent employment. The only basis given by the Board for its reinstatement order was the citation of a prior Board decision. This Court remanded the case with the following admonition:

> "The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment 'for the reasons set forth in' Re Eagle-Picher Min. & Smelting Co. 16 NLRB 727, 833.
>
> * * *
>
> "The administrative process will best be vindicated by clarity in its exercise. . . . All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." (313 U.S. at 196-97)

Even if this Court determines the Board applied *Allied* merely as a precedent, the Board failed to make the analysis required by *Phelps Dodge*. The Board did not determine whether the Company's leaflet tended to have an impact on the employees' vote. Rather, the Board mechanically applied Board precedent with no reasoned basis for its order by adopting the Regional Director's statement that:

> "The rule set forth in *Allied Electric Products, Inc.* 109 NLRB 1270 is therefore applicable and Exhibit A [the Company's leaflet] is objectionable." (App. 4).

This type of "finding" has no place in the just and orderly administration of the NLRA. Clarity in administrative decisions is the only method by which private parties can be fairly treated and the public interest fully served.

Regency I is a dangerous precedent. The Court of Appeals for the Seventh Circuit countenanced two Board practices in direct conflict with applicable decisions of this Court. At least in the Seventh Circuit, the Board is now free to announce and apply general rules without promulgating them pursuant to the APA. The Board is also free, in the absence of a validly promulgated rule, to continue rendering decisions founded upon a mechanical use of Board precedent without considering the facts of the particular case before it and thus without determining whether its order in a particular case effectuates the policies of the NLRA.

II. The Decision of the Court of Appeals in *Regency II* is in Direct Conflict with an Applicable Decision of this Court.

In *Regency II*, the Court of Appeals for the Seventh Circuit approved a contingent waiver of initiation fees in direct conflict with this Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, this Court proscribed pre-election waivers of initiation fees by unions granted only to those employees who join the union before the election. The Court based its decision on the fact that, among other things, such a contingent waiver of initiation fees has the effect of: (1) buying union endorsements which paint a false portrait of employee support; and (2) causing employees who sign an authorization card possibly to feel some moral obligation to vote for the union. (417 U.S. at 277-78)

In the present case, the Union directly violated *Savair* by distributing charter membership cards[5] to the Company's employees. (App. 75, 86-87). The card speaks for itself. If an employee signs an authorization card "during an organizational drive" (and thus before, not after, the election), the employee is "exempt from payment of any initiation fee." The ALJ even admitted that the distribution of these cards constituted Union "misconduct." (App. 78)

The Court of Appeals enforced the Board's order in spite of the Union's misconduct because the Union mentioned its initiation fee policy in a campaign leaflet distributed to the employees approximately three months after it had distributed the charter membership cards. This leaflet did nothing, however, to purge the Union's *Savair* violation. First, the leaflet did not mention charter memberships.[6] Second, the leaflet was not aimed at employees who had already joined the Union[7]. Third, and most important, the Union did not divest itself of the benefits which continued to accrue from its unlawful waiver. Even after the leaflet was distributed there were still as many as fifty charter members voting in an election which the Union won by only 21 votes. Those charter members continued to: (1) paint a false portrait of employee support; and (2) still possibly feel some moral obligation to vote for the Union.

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5 *Cf.*, Inland Shoe Mfg. Co., Inc., 211 N.L.R.B. No. 73 (1974) and D.A.B. Industries, Inc., 215 N.L.R.B. No. 96 (1974).

6 The question and answer in the Union's leaflet relied upon by the ALJ state:
Question: Will I have to pay an initiation fee if the union is voted in?
Answer: Absolutely not! Anyone presently working at Regency is hereby guaranteed that they will not pay any initiation fee. (App. 77)

7 Whereas the charter membership cards were given only to a select group of employees, the Union's leaflet was mailed to all the employees for the sole purpose of soliciting new Union supporters. This is apparent from an examination of the question and answer which immediately preceded the question and answer set forth in note 6:
Question: If I haven't signed a union card can I still vote yes to have a union?
Answer: Yes you can. Signing a card has nothing to do with how you vote. Your vote will be cast in secret and you can vote yes regardless of whether or not you signed a card. (Company's hearing exhibit 6)

The benefits derived from the Union's *Savair* violations remained undiminished at the time of the second election. Fifty of the Company's employees held "VALUABLE" charter membership cards providing an exemption from initiation fees for those employees who had joined the union "during an organizational drive." The Union had done nothing to divest itself of the benefits accruing from the improper economic inducement which it had bestowed upon those fifty employees. The facts in this case are more demanding than those in *Savair* for requiring the setting aside of an election.

Regency II conflicts with and severely undermines this Court's decision in *Savair*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES K. SOMMER
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Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1067

REGENCY ELECTRONICS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Respondents.

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION TWENTY-FIVE

REGENCY ELECTRONICS, INC.
Employer

and Case No. 25-RC-4811

INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO-CLC
Petitioner

REPORT ON OBJECTIONS AND RECOMMENDATION TO THE BOARD

Pursuant to a petition filed on October 20, 1971, and a Stipulation for Certification Upon Consent Election approved by the undersigned, an election was conducted on December 17, 1971, among certain employees[1] of the above-named Employer to determine whether they desired to be represented for purposes of collective bargaining by the Petitioner.

The tally of ballots served upon the parties at the conclusion of the election, shows the following results:

Approximate number of eligible voters	242
Void Ballots	5
Votes cast for Petitioner	104
Votes cast against Petitioner	117
Valid votes counted	221
Challenged ballots	12
Valid votes counted plus challenged ballots	233

On December 22, 1971, the Petitioner filed timely objections to conduct affecting the results of the election, and served a copy thereof on the Employer.

---

1 The appropriate bargaining unit as set forth in the Stipulation is as follows: All production and maintenance employees of the Employer at its Indianapolis, Indiana establishment, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; BUT EXCLUDING all office clerical employees, all engineers, all engineer aids, all guards, professional employees and Supervisors as defined in the Act.

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, an investigation of the various issues raised by the Objections has been conducted under the direction and supervision of the Regional Director, National Labor Relations Board, Region Twenty-five, who, after considering the results thereof, reports thereon as follows:

THE OBJECTIONS

The Petitioner's objections read in relevant part as follows:

1. On December 16, 1971, the day prior to the election, the Company distributed to all employees an exact duplication of the Boards Sample Ballot, and added an X and a red heart to the "NO" square. In so doing the Company gave the impression that the N.L.R.B. was, by implication, endorsing the Company's position.

2. The Company called an active union supporter into the office and coerced and intimidated her to the degree that she became highly nervous and excited.

By these and other acts the Company destroyed the "Laboratory Atmosphere" necessary for a free and democratic election required by the board.

OBJECTION I

Attached as Exhibit A is the Employer's publication complained of. Attached as Exhibits B, C and D are documents reflecting the parties use of the Red Heart symbol in the election campaign.[2] The ballot set forth on Exhibit A is identical in size and content with the official election

---

2 Exhibit B was also published by the Employer and Exhibit C and D by Petitioner.

ballot. The rule set forth in *Allied Electric Products, Inc.* 109 NLRB 1270 is therefore applicable and Exhibit A is objectionable. Contrary to the Employer the criterion is not whether the entire document is an official agency document, or contains other propaganda which clearly marks it as the product of a party, but whether the reproduced, ballot itself is distinguishable from the agency's official ballots in size or content *Hughes Tool Co.* 119 NLRB 739 and case cited.

The ballot used in the instant case clearly is not. Similarly, contrary to the Employer, the Board has not modified the *Allied Electric* rule.[3] *Rett Electronics,* 169 NLRB 1111, cited by the Employer, and other cases holding marked ballots unobjectionalbe [sic] all dealt with ballots clearly distinguishable in size or content from the Board's sample or official ballot. As above noted the ballot produced by the Employer is indistinguishable from the offcial sample ballot produced on the official election notice.[4]

Accordingly it is recommended Objection I be sustained.

OBJECTION II

In support of Objection II Petitioner's witness A testified that on the day before the election she was summoned

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3 The nature of the ballot or the markings involved in the *Aragon Mills* case 135 NLRB 859 are insufficiently described to conclude that case has applicability herein. In *Vernon Convalescent Center* 194 NLRB No. 67 there is no suggestion that had the victorious union circulated the ballot the election would not have been set aside.

4 The Employer's claim that the red heart superimposed on the X in the no box of the ballot distinguishes it from the official ballot is without merit since in all the circumstances the heart like the X itself constitutes a marking of the ballot and does not constitute what is otherwise is clearly an official ballot an employer ballot.

to the Plant Manager's Montague's office to speak to foreman Bright. There Bright said:

> "Someone has told me, that you have been going around on your lunch hour and telling the girls that your rate had been raised from 50 to 100 and that if the company was going to do this the day before the election, look what would happen if the union did't [sic] get in and if you're smart you had better put on a button and vote for the union." He said, "as a result of this you have gotten girls to put on buttons who had not been for the union before and this was under false pretences because your rate had not been changed." I told him that I had given three girls buttons but that these had been for the union all the time. He said that I had been even in packing dept. and had spent my lunch hour walking around and trying to talk girls into putting buttons on. I told him that I hadn't left my work area during lunch and I had four witnesses. From this point on the conversation got confused, with us arguing about this whether I had gone out of my area or not and arguing about the union girls starting trouble or whether the company started it by putting up letters on the bulletin board and about whether or not my rate had been raised. I explained to him how the story of my rate change might have gotten turned around (because my group leader had told me that the company was going to add another girl to our group and raise the rate from 50 to 100 that day and I told another girl that this was to be the case when she said it was good that we'd get another girl to help us). Montague came into this conversation sometime after the conversation got confused with argument but I don't recall when. The argument was principally about how the story got started of my telling the girls that the company had raised my rate: I tried to explain several times and they just argued back reporting what "someone" had said you. Nothing else was mentioned about my union activity aside from what I have said nor was anything mentioned about other employees and the

way they should or would vote nor anything else about the election. The argument lasted about an hour until Montague told me to go back to my seat because I was stopping production and had argued with them long enough. I didn't begin to cry until I began to leave the office and was crying most of the rest of the afternoon at my work station. Only my group leader said anything after this when she told me that someone was just starting trouble by spreading the rumor of what I said and that I shouldn't worry about it or try to find out who did it because there were other girls who might cause trouble with the girl who did it. No other supervisor or foreman mentioned it.

Although Employer witnesses versions of events are somewhat at odds with A, the difference need not be reconciled since (a) A's testimony was not established objectionable conduct and (b) in any event the incident is isolated. It is accordingly recommended that Objection II be overruled.

RECOMMENDATION

For the reasons set forth above it is recommended that Objection I be sustained; Objection II be overruled and a new election be directed herein by the Board.

DATED AT Indianapolis, Indiana on this 28th day of January 1972

/s/ Wm. T. Little

Wm. T. Little, Regional Director
National Labor Relations Board
Region Twenty-five
Sixth Floor, ISTA Center
150 West Market Street
Indianapolis, Indiana 46204

Regency ELECTRONICS, INC.

THIS IS ONLY A SAMPLE BALLOT PREPARED BY THE COMPANY. WHEN YOU VOTE THE OFFICIAL BALLOT WILL BE HANDED TO YOU BY THE N. L. R. B. REPRESENTATIVE AT THE ELECTION ON FRIDAY, DECEMBER 17, 1971.

Vote NO and pay NO dues

Vote NO and have NO strikes

Vote NO and walk NO picket lines

Vote NO and have NO hate campaigns

Vote NO and have NO fighting

Vote NO and have NO troubled times

WE HOPE YOU WILL GIVE US YOUR VOTE OF CONFIDENCE SO THAT WE CAN CONTINUE TO PULL TOGETHER....NOT APART.

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

SAMPLE

FOR CERTAIN EMPLOYEES OF
REGENCY ELECTRONICS, INC.

Do you wish to be represented for purposes of collective bargaining by -

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
AFL-CIO, CLC ?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	
☐	♥

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

7

EXHIBIT A

THE PROOF OF THE PUDDING IS IN THE EATING.

Last week the Company told you how nice they were by upgrading some of their employees who were on the organizing committee last year.

The Company only gave you a one sided story like they always do—half-truths. What the Company did not tell you was that 28 employees were discriminated against and the Government made the Company give the employees an opportunity to be reinstated with $65,000.00 in back pay. So now you can see how the Company likes to twist things around to benefit themselves.

WE ARE ON OUR WAY

Now that we are on our way to organize ourselves into IUE, we can expect more "Love Letters" from the Company. We are sorry that our members who want IUE will be subjected to the Anti-Union tactics of the company. This usually is the final grip of companies that have short changed their workers in Wages and Benefits.

In the Company's "Love Letters" they have announced that they intend to substitute confusion for a Union and a contract, but we must all realize that the company has an awful lot to gain by keeping you unorganized. This is the general practice of non-union employers to start an anti-union campaign as soon as they find out their workers want a voice in governing their Wages, Seniority, Quotas and other working conditions.

The "Love-Letters" are designed to be read by you. You will read how "deeply concerned" the company is about your welfare. You may not have suspected from the

"SIZE OF YOUR PAYCHECK", but the "Love-Letters" will reveal that the company worries about your economic well being, at least to the point of being concerned about the way you spend your pay check. The "Love Letters" will tell you how they dread the thought of you wasting your money paying Union dues, for instance, these "Love Letters" will try to "BRAIN-WASH" you on that score.

Perhaps you had not realized as you and your co-workers have been meeting and talking about IUE, that the minute you become an IUE member you will change into a strike happy violent individual.

The "Love-Letters", of course, will forget to tell you that there are about 125,000 Union contracts governing labor-management relations and about 90% of them are signed with peaceful negotiations.

The "Love Letters" will forget to mention that more workers miss work because of colds than because of strikes and that strikes have to be authorized by the workers themselves and by secret ballot before they can be conducted.

There are more things these "Love Letters" will tell you. You will really enjoy reading them. You can tie them up with a little "BLUE BOW" and put them in your "HOPE CHEST". Hopes are about all you will get without IUE.

The IUE—a proven Union—whose workers are among the highest paid in the electrical and radio industry—is available to serve you. It's not a matter of being up to the Company—or the IUE—but it's strictly up to you. What you do on election day—will determine whether or not you have a Union at Regency. *IT'S UP TO YOU!!!*

What will you have—the same old deal that you've had for several years—or a new deal with the IUE AFL CIO.

IT'S UP TO YOU!!!!

Issued by, IUE In-Plant
Organizing Committee

EXHIBIT "B"

LOVE IS:

JOB SECURITY

- No Strikes - Ever.
- No Layoffs in over 2 years.
- Imaginative, enthusiastic and aggressive management creating and selling new products.

PENSION PLAN

- Voluntarily created and fully paid for by Regency for your retirement.

BONUSES

- In June of 1971, Regency voluntarily paid a substantial bonus in recognition of your efforts as part of the Company team.

RAISES

- During 1970 and 1971, your Company voluntarily increased wages 12 1/2%

NEW JOBS AND PROMOTIONS

- Over 100 new jobs created in the past year.
- New jobs mean more promotions.

WORKING CONDITIONS

- Your Company voluntarily air-conditioned the entire production area for your comfort.
- The Parking Lot was voluntarily enlarged for your convenience.

INCREASED EMPLOYEE BENEFITS

- Voluntary increase of 200% in Life Insurance benefits.
- Voluntary increase in Disability Income by 50%.
- Voluntary addition of Death In the Family pay benefit.

PAID HOLIDAYS

- Voluntary addition of 7th Paid Holiday.

WE'RE HAPPY TO TELL THE "REGENCY LOVE STORY".
IT HAS PROVIDED YOU WITH FREE, VOLUNTARILY ADDED BENEFITS.
WHY PAY FOR "THE IUE HATE STORY"?

VOTE NO ON DECEMBER 17.

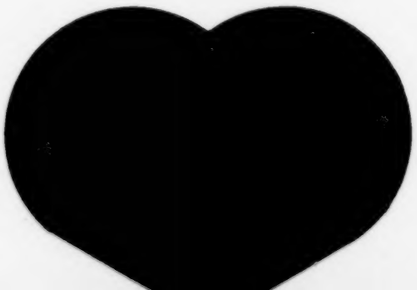

Exhibit "C"

LOVE LETTERS FROM THE COMPANY!!!

HERE WE GO AGAIN

The man at the plant gate said, "I have a love-letter for you today." Well—we can't say we weren't warned by the Union to expect this Company approach—to expect a change of attitude—to expect a propoganda barrage of "How Well" we've had it at Regency.

The problem is—this just isn't the Company—this isn't the Regency Way—these "Love-Letters from Regency" just don't ring true.

Now we girls all know from time to time we must engage in some "sweet-talk" and "Love-Letters" to our husbands. You men do it too, but you just aren't as subtle at this kind of thing as we women are.

Why don't we give our men (or wives) this special "red-carpet" treatment? Well . . . we sometimes get into trouble . . . we neglect our men . . . promise them anything then forget what we promised . . . we mistreat them or hurt them in some way . . . nag them to get more work done around the house . . . and other things.

S o o o . . . what's the answer . . . why we give them some "sweet-talk" . . . some "Love-Letters" and hope they will soon forget . . . and most of the time they do!! Now isn't that the real reason we are receiving "Love-Letters" from Regency? Well, we aren't ready to "Kiss and Make-up". We don't buy the company's claim that they "voluntarily gave" us all those goodies they claim to have given.

1. They must give something or nobody would work for them, so they give as little as the traffic would bear.
2. It's a fact that no one would give as much voluntarily as they would were they forced to give it.

How many would pay income taxes if it were paid "voluntarily"? How about auto license tags? Lodge Dues?

WE DON'T BUY THIS "REGENCY LOVE-LETTER"!!!

What we do buy is IUE for 1972. The IUE is available to assist us in getting what we desire and deserve from Regency. Let's get together and get us a good Union.

THERE'S A FUTURE FOR U IN IUE

Vote YES on December 17, 1971

ISSUED BY,
IUE-IN-PLANT
ORGANIZING COMMITTEE

EXHIBIT "D"

Indianapolis, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGENCY ELECTRONICS, INC.
Employer

and Case No. 25-RC-4811

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC
Petitioner

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

Pursuant to a stipulation for certification upon consent election approved on November 17, 1971, an election by secret ballot was conducted on December 17, 1971, under the direction and supervision of the Regional Director for Region 25, among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that, of approximately 242 eligible voters, 104 cast ballots for the Petitioner, 117 against the Petitioner, and there were 12 challenged and 5 void ballots. The challenged ballots were insufficient in number to affect the results of the election. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, Section 102.69, the Regional Director conducted an investigation of the issues raised by the objections. On January 28, 1972, the Regional Director issued his Report on Objections, finding that Petitioner's objection 2 lacked merit and

recommending that it be overruled, but recommending that Petitioner's objection 1 be sustained and a new election be directed.

Thereafter, the Employer filed timely exceptions to the Regional Director's Report on Objections and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record of this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Employer at its Indianapolis, Indiana establishment, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; but excluding all office clerical employees, all engineers and engineer aids, all guards, professional employees and supervisors as defined in the Act.

5. The Board has considered the Regional Director's Report, the Employer's exceptions thereto, and its brief in support thereof, and the entire record in this case, and hereby adopts the Regional Director's findings and recommendations. Accordingly, as we sustain objection 1, we shall set the election aside and direct that a second election be conducted.

ORDER

IT IS HEREBY ORDERED that the election conducted on December 17, 1971, be, and it hereby is, set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director for Region 25 deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period, because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the desig-

nated payroll period, and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

Dated, Washington, D.C., February 25, 1972.

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

2 In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N. L. R. B. v. Wyman-Gordon Company*, 394 U. S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 25 within 7 days of the date of this Decision and Direction of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION TWENTY-FIVE

REGENCY ELECTRONICS, INC.
Employer

and Case No. 25-RC-4811

INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO-CLC
Petitioner

REPORT ON OBJECTIONS AND RECOMMENDATION TO THE BOARD

Pursuant to a petition filed on October 20, 1971, and a Stipulation for Certification Upon Consent Election approved by the Regional Director, an election was conducted on December 17, 1971, among certain employees[1] of the above-named Employer to determine whether they desired to be represented for purposes of collective bargaining by the Petitioner. On December 22, 1971, the Petitioner

1 The appropriate bargaining unit as set forth in the Stipulation is as follows: All production and maintenance employees of the Employer at its Indianapolis, Indiana establishment, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; BUT EXCLUDING all office clerical employees, all engineers, all engineer aids, all guards, professional employees and Supervisors as defined in the Act.

filed timely objections to conduct affecting the results of the election, and pursuant to a Decision, Order and Direction of Second Election issued by the Board on February 25, 1972, the election conducted on December 17, 1971, was set aside and a second election conducted on March 24, 1972.

The tally of ballots served upon the parties March 24, 1972, at the conclusion of the election, shows the following results:

Approximate number of eligible voters	257
Void Ballots	10
Votes cast for Petitioner	133
Votes cast against Petitioner	112
Valid votes counted	245
Challenged ballots	0
Valid votes counted plus challenged ballots	245

On March 31, 1972, the Employer filed timely objections to conduct affecting the results of the election, and served a copy thereof on the Petitioner.

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, an investigation of the various issues raised by the Objections has been conducted under the direction and supervision of the Regional Director, National Labor Relations Board, Region Twenty-five, who, after considering the results thereof, reports thereon as follows:

THE OBJECTIONS

1. The Second Election was improperly ordered by the Board because no valid grounds existed for setting aside the First Election. In support of this objection, Regency respectfully requests that the following pleadings served

on the Regional Director be incorporated by reference herein and made a part of the Objections to Second Election:

(a) Letter of Regency to the Regional Director dated December 30, 1971.

(b) Employer's Exceptions to the Report of the Regional Director.

(c) Petition for Reconsideration of the Board's Decision, Order and Direction of Second Election.

2. Prior to the ordering of the Second Election, Regency requested the Regional Director to conduct a hearing to determine the impact on employees of a certain leaflet distributed by Regency, a copy of which is attached to the aforementioned pleadings. Refusal to conduct such a hearing deprived Regency of the opportunity to introduce evidence that the leaflet did not give the impression that the Board was endorsing Regency's position with respect to the employees' choice of a bargaining representative. With no evidence concerning what impact the leaflet had on the employees, the Board's order of a Second Election was invalid.

3. The Board's direction of a Second Election improperly ordered that the election eligibility list be determined as of February 20, 1972, whereby employees hired subsequent to the First Election were permitted to vote in the Second Election. By allowing such new employees to vote, the Board precluded any possibility of determining the impact of the leaflet on the employees who voted in the First Election.

4. The Union coerced and intimidated the employees by threatening economic harm if union authorization cards were not signed, and the Union also promised discriminatory benefits if employees did sign cards by offering to

waive all initiation fees and dues for only those employees who executed authorization cards.

5. The Union coerced and intimidated the employees by stating to them that voting for the Union was a condition to continuing in the employment of Regency.

6. The Union coerced and intimidated the Black employees of Regency by a concerted effort to foment racial unrest and hate.

7. The Union coerced and intimidated the employees by stating that Regency's personnel manager lied when he stated that striking employees would not be paid for the term of the strike. Such statement by the Union to the employees was made under circumstances and at a time and place which denied Regency an opportunity to respond.

8. The Union coerced and intimidated the employees by stating that the Union could obtain a 16.5% wage increase for the employees in contravention of the guidelines established by the Pay Board. Such statement was made with the assertion that the Union had sufficient "connections" in Washington, D.C. to obtain permission for such a wage increase. Further, such statement was patently false and was made under circumstances and at a time and place which denied Regency an opportunity to respond.

9. The "Laboratory Atmosphere" necessary for a free election was destroyed when the Board Agent allowed a known Union supporter to assist him in announcing to the employees when it was time to vote.

10. The Union coerced and intimidated the employees by making unannounced personal visits to the homes of the employees at times when the employees' husbands were known not to be home. Such visits were unnecessary in view of the fact that the union had ample opportunity

to communicate with the employees at times and places other than the employees' homes.

11. The Union coerced and intimidated the employees by stating that the employees were the lowest paid skilled workers in the area and by telling a certain employee of Regency that other employees at Regency with less seniority and lower work classifications were receiving higher wages. Such statements were patently false and were made under circumstances and at a time and place which denied Regency an opportunity to respond.

12. In the course of campaigning for the Second Election, the Union appealed to racism, emotionalism and fear, thereby destroying the "Laboratory Atmosphere" necessary for the Second Election. Regency has been prevented from obtaining other specific instances of the Union's misconduct in that an atmosphere of confusion and fear still exists at Regency because on or about March 29 and 30, 1972, the Union distributed to employees a copy of a telegram attached hereto as Exhibit "A" which falsely asserts that Regency is threatening the physical well being of employees. In this atmosphere indicative of the Union's activities prior to the Second Election, employees are reluctant to reveal other acts of coercion and intimidation perpetrated by the Union.

OBJECTIONS 1 AND 2

On March 6, 1972 the Employer filed a Petition for Reconsideration of the Board's Decision, Order and Direction of Second Election. On March 13, 1972, after considering the matter, the Board issued an Order Denying Petition.

In its Objections No. 1 and 2, the Employer now attempts to re-litigate matters previously presented and ruled upon.

As these objections raise no issue not previously considered or new evidence relating thereto, it is recommended that Objections 1 and 2 be overruled. *Lloyd A. Fry Roofing Company*, 121 NLRB 1433, 1434-5.

OBJECTION 3

It is well established Board policy in directing a new election after setting aside the results of a previous election to utilize a current payroll eligibility date rather than that used in the first election, absent special circumstances not present herein. Accordingly, it is recommended that Objection 3 be overruled. *The Great Atlantic & Pacific Tea Company*, 121 NLRB 38; *Socony-Vacuum Oil Company, Inc.*, 84 NLRB 969; *Wagner Electric Corp.*, 127 NLRB 1082.

OBJECTION 4

In support of Objection 4, the Employer proffered a single witness who it alleges was told by the Union that she would not have to pay union fees of any nature whatsoever if she signed a union authorization card, but would be required to pay union dues and initiation fee if she did not sign a card. That witness states "One of them then asked me if I had signed my union authorization card and I said I had and had already mailed it in. Then he told me that I wasn't obligated to pay any initiation fees because I had already signed the card. Then he said that those that hadn't signed up would have to pay a $25.00 initiation fee and that I wasn't obligated to pay this $25.00 fee. That was all said about the money part. They didn't say anything about union dues. This was the only conversation I had with anyone for the Union about paying money to the Union." The waiver of initiation fees during an organizational campaign does not constitute objectionable

conduct. *DIT-MCO, Incorporated*, 163 NLRB 1019. Accordingly, it is recommended that Objection 4 be overruled.

OBJECTION 5

The sole witness proffered by the Employer in support of this objection states ". . . this occurred about a week or so before the NLRB election in December, 1971 when as I was entering the doors to work and just as I got in the plant one of the girls that works at Regency came up to me and she handed me a union card and she told me not to let anyone know I had the card. Then she asked me how did I feel about the union and I told her I didn't know. Then she said that I had to vote for the union in order to work for Regency. That was all that was said. I then walked away. I don't know if anyone else heard our conversation. I then went to the table where I worked and I asked a couple of girls I work with . . . if it was true that you had to vote for the union in order to work here and they told me no and that I could vote any way I wanted to vote. Then I pointed out the girl who had given me the union card and had told me I had vote for the union (as described above) and asked [X] who she was. [X] told me her name was Shirley Meek. As far as I know Meek didn't hold any office for the union nor do I know that she was an agent for the union at any time. All I know about her and the Union is that she was for the union and was handing out union cards and literature. This instance mentioned above was the only time anyone ever told me I had to vote for the union in order to keep working at Regency. . . . I didn't mention anything to the union representatives about my being told, by Shirley Meek, that I had to vote for the union in order to keep working at Regency. I didn't mention it to them because I already had been told by [X] and other em-

ployees that it wasn't true that I had to vote for the union in order to keep working at Regency and I wasn't worried about it. There wasn't any union officials with Shirley Meek or anywhere near her when she told me this. Other than the time I asked [X] and the other employee about what Shirley had told me and I pointed Shirley out, as mentioned above, I didn't mention to any of the other employees that Shirley had told me that I had to vote for the union in order to keep working for Regency."

Aside from the lack of evidence as to any agency relationship as to Meek, who voted in the election without challenge, and the union, the statement involved herein contains neither assertions which the employee could not evaluate (as she herself so testifies), nor threats within the union's power to carry out. See *Globe Motors, Inc.,* 123 NLRB 30, 32; *Rio de Oro Uranium Mines, Inc.,* 120 NLRB 91.

Accordingly it is recommended that Objection 5 be overruled.

OBJECTION 6

The sole witness proffered by the Employer in support of this objection testifies that 3 or 4 days prior to the March election two Petitioner representatives, one black and one white, visited her home where she first advised them that they shouldn't waste her time as she did not believe in unions as she felt they were discriminatory; that one of the representatives asked her why she felt that way and she then described certain discriminatory practices that were suffered upon her sons by certain other unions. Thereafter a discussion ensued wherein the union advised the witness that they felt that Regency was not treating blacks in an equitable manner which the witness refuted and the representatives appealed that it was to

her best interest as a black to support the union. . . . . "Then Big John said 'We have got to stick together' and I asked him 'about what?' then Big John [the black representative] opened his mouth but before he got a chance to say anything my husband spoke up." The witness then states that her husband went on to advise that you don't join things because somebody says so and that then one of the union representatives asked her if she had ever been discriminated against on her job to which she replied ". . . no because I handled that all by myself." The witness states that then the two union representatives left. The witness states that that next morning she related this conversation with the two union representatives to the Employer's Personnel Manager.

Appeals to the solidarity and economic interests of racial groups where, as here, there is no evidence of attempting to set race against race or other inflammatory appeals, have been found to be permissible campaign propaganda, and Objection 6 is therefore without merit and it is recommended it be overruled. *Baltimore Luggage Company,* 162 NLRB 1230; *Aristocrat Linen Supply Co., Inc.,* 150 NLRB 1448; *The Archer Laundry Company,* 150 NLRB 1427.

OBJECTION 7

The witness proffered by the Employer in support of Objection 7 states that around a week and a half before the March election a union representative told her ". . . that he wanted to make it clear about Terry Campbell saying that we wouldn't be paid for being on strike. He went on to say that that wasn't true and that we would be paid. He went on to say that if we went on strike we would be paid around $12.00 per week. Then I said that that was the trouble right there; that the union wasn't

explaining themselves to the employees because half of them don't realize that you don't get paid unless you sign up and walk picket duty and then you don't get it right away. Then he said that that's why they needed someone like me to come to the union meetings and explain this to the employees that were at the meeting. . . . The occasion when Terry Campbell had talked about the employees not being paid while on strike was just about a day or two before the union representatives visited my home . . . when Terry had a meeting of all the plant employees at work in the cafeteria and there Terry brought up the subject about being on strike; he said he was bringing up the subject because so many people had been questioning him about it. Then he said something about that we wouldn't get paid if we went on strike and then he went on to say some more about it but I can't recall just exactly what he said. Several people hooted when he said this so I didn't catch everything he said."

There is no evidence proffered or adduced that the Petitioner made claims that the employees would receive compensation comparable to their normal income while on any strike, and if indeed it had, such a statement could be expected to receive a proper evaluation by the electorate, especially where, as here, the employees involved work and live in an area heavily industrialized where strikes and reports thereof are not of such infrequency that the general working public is not appraised of the attendant consequences and conditions. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221; *Celanese Corporation of America*, 121 NLRB 303.

Accordingly, it is recommended that Objection 7 be overruled.

OBJECTION 8

The employee witness testifying in support of this objection states she attended a union meeting attended by around 40-50 Regency employees, held sometime 2 to 4 weeks before the December election wherein one of the employees ". . . asked 'what about 5 1/2% wage control?' Then [Union Representative] Barkley said 'If my memory serves me correctly' and then he said to don't hold him to it but that the way he recalled it was that since Regency was an employer of less than 1000 employees and he went on to say that, if he remembered correctly Regency would not be required to report to the Pay Board about any wage increase granted to we employees. Barkley went on to say that Regency was in the category of employers that would receive spot checks, instead of reporting, on the wages and should, Barkley went on, a check occur then the wages would have to be rolled back to the Pay Board's specifications but however, Barkley went on to say, that they could through special permission get more than 5 1/2% if they could prove that we were substantially underpaid and he went on to say that he was sure that we were all agreed that we were. Then another employee asked if the fringe benefits were excluded in the 5 1/2% control and Barkley said that as far as he could remember the benefits were not included and that the benefits could far exceed the 5 1/2%." The witness states that on the following morning she repeated the union's comments (described above) to certain management officials and was given a newspaper clipping, which she states was later posted on the Company bulletin board, which set forth the position of the Pay Board on the matter of wage increases and fringe benefits.

In addition, the Employer has submitted information relative to Objection 8 therein advising that an Employer

representative was invited to a Union meeting on March 22, 1972 where ". . . in the course of the event, the subject of wage increases was proposed and discussed. To my best recollection, Mr. Rutherford indicated to those employees present that the union had special connections in Washington with the Pay Board wherein, in accordance with the union's experience in the past, it had and would be able to obtain approval for wage increases up to 16.6%. The manner in which the statement was made left the obvious implication that the union was promising a 16.6% wage increase. The union represented that such an increase could be obtained in contravention of the guidelines established by the Pay Board. At the time the statement was made, the circumstances were such that no effective response could be made."

"Puffing" or exaggeration of potential prowess in securing additional benefits of this type is common union campaign propaganda and such assertions of the above are of a nature which employees could be expected to assess with some accuracy. *Thiem Industries, Inc.*, 195 NLRB No. 200; *Hollywood Ceramics*, supra. It is obvious that any wage increase sought by the union must first be agreed to by the Employer and it is reasonable to assume the employees were aware of this. Further, the Employer had ample time to make its position on the subject known to the electorate. *Ralston Purina Company*, 147 NLRB 506. Accordingly, it is recommended that Objection 8 be overruled.

OBJECTION 9

The Employer has withdrawn its Objection 9.

OBJECTION 10

The Employer asserts that while it is aware a union may make personal visits to the homes of employees in order to electioneer it was not necessary in the instant case because the Petitioner had full opportunity to otherwise freely communicate with the employees. It further asserts that since the Employer did not have equal opportunity, under the law, to make individual home visits the Petitioner received an unfair advantage which destroyed the "Laboratory Atmosphere." These assertions require little comment other than that the Employer was free to and did communicate its views to the employees and there is no rule that either party has the right to the last word in unobjectionable election propaganda. Since the Employer proffers no evidence and none was adduced that Petitioner "coerced and intimidated" employees it is recommended Objection 10 be overruled. *Audubon Cabinet Company*, 119 NLRB 349.

OBJECTION 11

The witness proffered by the Employer in support of the first part of this objection refers to this matter thusly: ". . . [Petitioner representatives] asked me how would I feel if I knew that there was this employee with less seniority who was making more per hour than I was and was doing the same work. Then I said that that was a lie; that all repair girls make the same because the prices or wages for the job classifications are posted on the bulletin board, and I went on to say that I knew who he had reference to because that person was doing repair and drawing inspector's pay and also another person was doing repair and drawing group leader's pay. They didn't say anymore about someone having less seniority and getting more pay than I."

In regards to the second part of Objection 11, the witness proffered in support thereof refers to two occasions, one occurring about a week before the December election when ". . . they [Petitioner representatives] told me that they felt our production rates were too high for the money we were getting. Then one of them told me that we were the lowest paid employees (he didn't say in what area or in comparison to what) and that he felt we should get at lease $1.00 more per hour and then he said that at RCA and Western Electric they paid more money than what we were getting at Regency (he didn't say how much). He said that they had a union there at those places. He didn't say which union it was. Then he talked about that he didn't feel that our retirement plan and insurance plan was very good." The witness further states that the second occasion occurred around a week before the March election when ". . . they [Petitioner representatives] then read from a newspaper clipping how much money Regency had made last year and they said that the employees should have gotten part of that money because we were the ones that made it. One of them said that by our being the lowest paid employees we should have gotten part of the profits. That's about all they said about Regency employees being the lowest paid employees."

As to the first part of Objection 11 it is evident that the employee involved was not misled, was quite capable of evaluating the statement in question, and was cognizant that the union was not the authoritative source of information of that nature. *Hollywood Ceramics,* supra. As to the statements referred to in the second part of this objection, the undersigned finds no serious or substantial misrepresentation therein. *Wells Fargo Security Guard Services, Division of Baker Protective Services, Inc.,* 194 NLRB No.

130 and the cases cited therein. It is therefor recommended that Objection 11 be overruled.

OBJECTION 12

Petitioner's telegram of March 27 was issued after the election and thus obviously cannot be considered as objectionable conduct. The Employer proffers no evidence in regard to Objection 12 of any specific conduct by the Petitioner occurring prior to the election. *Audubon Cabinet Company,* supra. Accordingly, it is recommended that Objection 12 be overruled.

RECOMMENDATIONS

For the reasons hereinabove set forth:

IT IS HEREBY RECOMMENDED that the objections be overruled in their entirety, and that an appropriate Certification of Representative issue forthwith.

ISSUED AT Indianapolis, Indiana, this 27th day of April, 1972.

/s/ George M. Dick

George M. Dick, Acting Regional Director
National Labor Relations Board
Region Twenty-five
Sixth Floor, ISTA Center
150 West Market Street
Indianapolis, Indiana 46204

198 NLRB No. 87 D—6615

Indianapolis, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGENCY ELECTRONICS, INC.
Employer

and Case No. 25-RC-4811

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
AFL-CIO-CLC
Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision, Order, and Direction of Second Election issued February 25, 1972,[1] the Board adopted the Regional Director's recommendation to set aside the stipulated election conducted December 17, 1971, and directed that a second election be held. A motion for reconsideration was filed on March 6, 1972, and denied by the Board on March 13, 1972.

On March 24, 1972, a second election was conducted under the direction and supervision of the Regional Director for Region 25 among the employees in the appropriate unit. At the conclusion of the balloting, the parties were furnished a tally which showed that of the approximately 257 eligible voters, 133 votes were cast in favor of the Petitioner, 112 were cast against the Petitioner, and 10 votes were challenged. The challenges were not sufficient

1 Not printed in NLRB volumes.

in number to affect the outcome of the election. Thereafter, on March 31, 1972, the Employer filed timely objections to the conduct affecting the second election. On April 27, 1972, the Acting Regional Director issued his report to the Board wherein he recommended that the objections be overruled and a certification of representative issue. Thereafter the Employer filed timely exceptions to the Acting Regional Director's report on objections and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Acting Regional Director's report, the Employer's exceptions thereto, and its brief in support thereof, and the entire record in this case[2] and hereby adopts the Acting Regional Director's findings and recommendations.[3]

2 The Employer's request for oral argument in this case is hereby denied as its exceptions and briefs adequately present the contentions of the Employer.

3 The Employer's exceptions 1 and 2 allege, in the main, that the Acting Regional Director's investigation was erroneously limited to questioning only employees whose names the Employer supplied. We find no merit in the Employer's contentions. It is well established that a party seeking to have the Board overrule a Regional Director's finding and recommendations to an election must supply specific evidence which *prima facie* would warrant setting aside the election before the Board will direct a hearing or require the Regional Director to pursue his investigation further. *Bufkor-Petzner Division, Inc.*, 169 NLRB 998. The Employer has failed to establish the presence of sufficiently extraordinary circumstances which would warrant our deviating from that rule in this case. We further find that none of the Employer's exceptions to the Acting Regional Director's rulings raise any substantial or material issues of fact requiring a hearing in this case.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Union of Electrical, Radio and Machine Workers, AFL—CIO—CLC, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

Dated, Washington, D.C. Aug. 1, 1972.

Edward B. Miller, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

3 (cont.)

With respect to Objection 5, we need not and do not reach the merits inasmuch as the conduct on which that objection rests did not occur within the critical period for the second election. See *Singer Company, Wood Products Division*, 161 NLRB 956, fn. 2.

With respect to Objection 7, we agree to its rejection solely because the proffered evidence showed no more than that Petitioner advised a single employee it paid strike benefits of $12 a week. We do not adopt or pass upon the Acting Regional Director's gratuitous comment that even if Petitioner had stated, as the Employer apparently claimed, that employees would lose no income during a strike, such a statement would, nonetheless, afford no ground for setting aside the election.

200 NLRB No. 88 D—6944

Indianapolis, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGENCY ELECTRONICS, INC.

and Case 25-CA-5134

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

DECISION AND ORDER

Upon a charge filed on August 24, 1972, by International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called the Union, and duly served on Regency Electronics, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on August 29, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 1, 1972, following a Board election in Case 25—RC—4811 the Union was duly certified as the exclusive collective-bargaining representa-

time of Respondent's employees in the unit found appropriate; and that, commencing on or about February 24, 1972, and more particularly on August 18, 1972, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 7, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 13, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and renewal thereof on October 30, 1972. Subsequently, on September 21, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1 Official notice is taken of the record in the representation proceeding, Case 25-RC-4811, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice to Show Cause, Respondent contends that the Union is not the exclusive representative of its employees because there were no valid grounds for setting aside the first of two elections in the underlying representation proceeding and that the second election was invalid because the voting eligibility list used for the second election improperly permitted employees hired after the first election to vote in the second election. We do not agree.

The record in Case 25—RC—4811 indicates that in an election conducted pursuant to a Stipulation for Certification Upon Consent Election there were approximately 242 eligible voters of whom 104 cast ballots for, and 117 cast ballots against, the Union and 12 ballots were challenged. The Union filed objections to conduct affecting the results of the election in which it alleged that (1) on the day before the election Respondent distributed duplications of the Board's sample ballot with the addition of a red heart around and an x mark within the "No" box, and (2) that Respondent called an active union supporter into the office and coerced and intimidated her to the degree that she became nervous and excited.

After investigation the Regional Director issued a Report on Objections and Recommendations to the Board in which he recommended that the Union's first objection be sustained, the second overruled, and a new election be directed. Respondent filed exceptions to the Regional Director's report contending that the Regional Director had misapplied Board precedent and should have ordered

a hearing on the objections. On February 25, 1972, the Board issued a Decision, Order and Direction of Second Election in which it adopted the Regional Director's findings and recommendations, set aside the election, and directed a second election. Thereafter, on March 3, 1972, Respondent filed a Petition for Reconsideration of the Board's Decision, Order and Direction of Second Election in which it invited the Board's attention to a recent decision and reiterated the contentions advanced in its exceptions to the Regional Director's report. Finding the cited case inapposite, the Board, on March 13, 1972, issued an Order Denying Petition in which it denied Respondent's petition for reconsideration as lacking in merit.

A second election in which there were approximately 257 eligible voters was conducted on March 24, 1972. The tally of ballots showed that there were 133 votes for, 112 against, the Union and that there were no challenges. Respondent filed timely objections to conduct affecting the results of the election, alleging, in substance, that: (1) The second election was improperly ordered because there were no grounds for setting aside the first election; (2) Respondent was deprived of favorable evidence by the Regional Director's refusal to order a hearing; (3) the Board improperly ordered the use of a new eligibility list for the second election; and (4) the Union coerced employees by threats of economic harm unless they signed union authorization cards and by promising to waive initiation fees and dues for those who signed cards. The Acting Regional Director conducted an investigation and issued a Report on Objections and Recommendation to the Board overruling all of Respondent's objections.

On May 12, 1972, Respondent filed exceptions to the report of the Acting Regional Director with a supporting brief and, on May 15, 1972, petitioned the Board for oral

argument. On August 1, 1972, the Board issued a Supplemental Decision and Certification of Representative in which, *inter alia*, it adopted the Acting Regional Director's findings and recommendations, denied the Respondent's request for oral argument, and certified the Union as exclusive representative of the employees in the appropriate unit. In its answer to the complaint and in its response to the Notice To Show Cause, Respondent relies on the same contentions which it raised in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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2 See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Findings of Fact

I. The Business of the Respondent

Respondent is an Indiana corporation with its principal office and place of business in Indianapolis, Indiana, where it is engaged in the manufacture, sale, and distribution of electronic equipment and related products. During the past year Respondent purchased goods and materials valued in excess of $50,000 which were transported directly to its Indianapolis facility from States other than the State of Indiana. During the same period Respondent manufactured, sold, and distributed products valued in excess of $50,000 which were shipped from said facility directly to States other than the State of Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Union of Electrical, Radio and Machine Workers, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceedings

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Respondent at its facility, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; but excluding all office clerical employees, all engineers and engineer aides, all guards, professional employees and supervisors as defined in the Act.

2. The certification

On March 24, 1972, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 25, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 1, 1972, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about February 24, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 24, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since February 24, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the

appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions Of Law

1. Regency Electronics, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Respondent at its facility, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; but excluding all office clerical employees, all engineers and engineer aides, all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 1, 1972, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 24, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Regency Electronics, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees of the Respondent at its facility, including all line assembly

> employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; but excluding all office clerical employees, all engineers and engineer aides, all guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reason-

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3 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

able steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. Nov. 30, 1972.

Edward B. Miller, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

D—6944

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of the Respondent at its facility, including all line assembly employees, all packaging employees, all component preparation employees, all coil assemblymen, all repair employees, all crystal repair employees, all inspectors, all technicians/trouble shooters, all testers, all shipping employees, all stock and receiving employees, all machine shop employees and all group leaders; but excluding all office clerical employees, all engineers

and engineer aides, all guards, professional employees and supervisors as defined in the Act.

REGENCY ELECTRONICS, INC.
(Employer)

Dated———— By————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 901-534-3161.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

No. 72-2001)
) On Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.
REGENCY ELECTRONICS, INC., *Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ARGUED SEPTEMBER 21, 1973 — DECIDED DECEMBER 3, 1973

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and CHRISTENSEN, *Senior District Judge.**

HASTINGS, *Senior Circuit Judge.* We have for consideration the petition of Regency Electronics, Inc. (the Company), to review and set aside an order of the National Labor Relations Board (the Board) issued against it on November 30, 1972, pursuant to §10(c) of the National Labor Relations Act, as amended, Title 29 U.S.C. §151, *et seq.* (the Act). This order is reported at 200 NLRB No. 88. The Board has cross-petitioned for enforcement of its order. We have jurisdiction since the underlying unfair labor practice is alleged to have occurred at the

* Senior United States District Judge A. Sherman Christensen is sitting by designation.

Company's plant in Indianapolis, Indiana. The Company is engaged in the manufacture, sale and distribution of electronic equipment and related products.

The Board found that the Company had violated §§ 8(a)(5) and (1) of the Act by refusing to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union), which had been certified by the Board as the exclusive bargaining representative of the employees of the Company in the representation proceedings hereinafter set out.

On October 20, 1971, the Union filed a petition for a representation election, together with a stipulation for certification upon consent election executed by the Union and the Company. Pursuant to the stipulation, the election was held on December 17, 1971, in a unit of certain employees of the Company. A total of 221 valid votes were counted. The Company received a majority, 117 to 104. In addition, there were 12 challenged votes cast which were not counted. Since the challenged ballots were insufficient in number to affect the outcome of the election, the challenges were not resolved.

On December 22, 1971, the Union filed timely objections to the election alleging in substance that on December 16, 1971, the day prior to the election, the Company had (1) coerced and intimidated an employee; and (2) distributed to all employees an exact duplicate of the Board's sample ballot, and marked an "X" and a red heart in the "NO" square, thereby giving the impression that the Board was endorsing the Company's position. The Regional Director of the Board timely and properly investigated the Union's two objections and on January 28, 1972, issued his report and recommendations to the Board. He found the allegation that the Company had coerced and intimidated an employee

to be without merit. However, he found merit in the Union's objections to the Company's distribution of the marked sample ballot and recommended that the Board direct a new election.

Overruling timely filed objections by the Company to the Regional Director's report on objections, on February 25, 1972, the Board issued a decision adopting the Regional Director's findings and recommendations, setting aside the results of the election and ordering a second election. As a part of this order the Board established a new voter eligibility list including unit employees "employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election." Accordingly, employees hired subsequent to the eligibility date of the first election were to be permitted to vote in the second election.

Subsequently, the second election was held March 24, 1972, which resulted in 245 valid ballots being cast. The Union received a majority, 133 to 112, with no challenged ballots. On March 31, 1972, the Company filed timely objections to the results of the second election alleging, *inter alia,* that the first election was improperly set aside and, further, that the Board improperly selected a new eligibility date for the second election.[1] Following proper administrative procedures, on August 1, 1972, the Board issued a supplemental decision and certification of representation finding no merit in the Company's objections and certifying the Union as the exclusive bargaining representative of the Company's employees in the bargaining unit found appropriate.

In order to seek judicial review, the Company refused to comply with the Union's request to bargain. An unfair

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1 Out of a total of twelve objections filed, the Company requests review of only these two objections.

labor practice complaint was subsequently filed. The matter was finally transferred to the Board itself for consideration of a show cause order on the General Counsel's motion for summary judgment and the Company's response thereto.

These proceedings culminated on November 30, 1972, in the Board's ordering the Company to cease and desist from refusing to bargain with the Union. It is this order which is the final order under present consideration by our court.

I.

The core of the first issue is whether the Board was warranted in setting aside the first election on the sole ground that the Company, on the day before the first election, distributed to all employees an exact duplicate of the Board's sample ballot altered in such a manner as to tend to mislead the employees to believe that it implied an endorsement of the Company by the Board. In short, the use of this type of information under the surrounding circumstances might have had an undesirable impact on the employees' freedom of choice.

The facts are not in dispute. There was the usual propaganda by both parties preceding the first election on December 17, 1971. The Union distributed leaflets referring to "Love Letters" from the Company as an attempt to "Brain-Wash" the employees to vote against the Union. The Company responded in a light vein with a leaflet entitled "The Regency Love Story," using thereon a number of red hearts. The Union reacted with further reference to the "Love Letters." There is no complaint by either party that this preliminary propaganda skirmishing was improper.

However, on the day before the election, the Company distributed to all employees another campaign propaganda leaflet which refers to on brief as the "Second Heart Leaflet." This was printed on one page of smooth white paper with the Company's name and symbol at the top, followed by company printed propaganda matter and an exact duplicate Board official sample ballot with an "X" marked in the "NO" box over which box was superimposed a red heart. We have attached a copy of this leaflet as an appendix to this opinion, except that here the color of the red heart is not evident.

In considering the Union's objection to the Company's use of the Board's sample ballot in the first election, the Regional Director stated:

> "* * * The ballot set forth on Exhibit A is identical in size and content with the official election ballot. The rule set forth in *Allied Electric Products, Inc.* 109 NLRB 1270 is therefore applicable and Exhibit A is objectionable. Contrary to the Employer the criterion is not whether the entire document is an official agency document, or contains other propaganda which clearly marks it as the product of a party, but whether the reproduced ballot itself is distinguishable from the agency's official ballots in size or content. *Hughes Tool Co.* 119 NLRB 739 and cases cited.
>
> "The ballot used in the instant case clearly is not. Similarly, contrary to the Employer, the Board has not modified the *Allied Electric* rule. * * * [Cases cited] holding marked ballots unobjectionable all dealt with ballots clearly distinguishable in size or content from the Board's sample or official ballot. As above noted the ballot produced by the Employer is indistinguishable from the official sample ballot produced on the official election notice."[2]

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2 Footnotes omitted, except that in note 4 the Regional Director states: "The Employer's claim that the red heart super-

Accordingly, the Regional Director recommended that this single objection be sustained.

It is beyond dispute that the duplicated ballot is identical in size and content with the Board's sample official ballot. It follows that here we are concerned with the Company's use of an official Board document in its flyer or leaflet. We do not have the use of a simulated or sketchy ballot or obvious propaganda statements in isolation from the official Board document.[3]

As earlier indicated and shown in the so-called Second Heart Leaflet, the copy of the official sample ballot has an "X" marked in the "NO" box over which is superimposed a red heart. At the top of the leaflet appears the symbol and name of the Company and below that appears a statement of obvious propaganda. The Company urges that this is merely a legitimate response to Union propaganda, particularly with respect to repeated Union reference to the Company's "Love Letters" and the use of red hearts on Union leaflets. We agree with the Company that we can view this Second Heart Leaflet and construe it for ourselves and evaluate its import.

The Company argues strenuously that the Board erred in setting aside the first election because the Board's action "was based on a mechanical application of a rule against the use of marked ballots" which the Board "purported to judicially promulgate * * * for future application as a *per se* rule in *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270 (1954)."

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2 (cont.)
imposed on the X in the no box of the ballot distinguishes it from the official ballot is without merit since in all circumstances the heart like the X itself constitutes a marking of the ballot and does not constitute what otherwise is clearly an official ballot an employer ballot."

3 Such was the situation in *NLRB v. Clarytona Manor, Inc.*, 7 Cir., 479 F.2d 976, 981 (1973).

Allied Electric Products has been the subject of much judicial comment and Board treatment over the years. Our recent decision in *NLRB v. John S. Barnes Corporation*, 7 Cir., 478 F.2d 1105 (1973), as well as the subsequent decision in *NLRB v. Clarytona Manor, Inc.*, 7 Cir., 479 F.2d 976 (1973) shed dispositive light on this contention.

In *Barnes, supra,* we recognized the rule in *Allied Electric Products* but preferred the Board's subsequent rule in *Rebmar, Inc.*, 173 NLRB 1434 (1968), where the Board set aside an election when the Board's election notice (a Board official document) had been reprinted and altered. We quote from *Barnes* the preferred rule which reads:

> "'*Our concern is not with the substance of the material added to the Board's official notice of election, but with the possible impact such a partisan message added to an official Board document, or copy thereof, might have on the freedom of choice of the voter.* We are of the opinion that the Board has a responsibility to inform employees fully of their rights and privileges under the Act, and to conduct elections in an atmosphere conducive to a determination of the uninhibited preference of employees. To that end the Board's notice of election contains information the Board believes should be made available to employees to improve their capability of casting a vote that fully reflects this freedom of choice. To this end the Board also publishes a leaflet including the same type of information, and it is available to anyone who desires to use it. The Board also has a responsibility to protect its processes against abuse or undesirable use. To duplicate a part of the Board's official notice and then to add to it a personal partisan message that may be interpreted by the employee as an endorsement by the Board of one of the parties to the election, and thus have an impact on the employees' freedom of choice is, we think, an undesirable use of Board documents designed for another purpose. *That the Union's*

message in this case may be arguably innocuous and that there may have been at most a narrow or technical violation of the Allied Electric Products, 109 NLRB 1270 rule, is clearly irrelevant. Whether deliberate or unintentional, such action has a tendency to mislead, and we are of the opinion that the Board should guard against having its prestige put to such possible abuse.' [*Rebmar*] at 1434 & 5 (Emphasis added.)'' *Barnes, supra* at 1107-08.

We recognized in *Clarytona Manor, Inc., supra,* 479 F.2d at 981, that "the significant factor in determining whether there is a tendency to mislead • • • is the utilization of official Board documents in connection with a partisan communication, even though that message may on the whole be innocuous." The court then referred to our holding in *Barnes,* at 1107, that to say the message there involved " 'could in no manner be interpreted by the employees as an endorsement by the Board of the Union' flies in the face of reason and experience." In *Barnes,* we applied the *Rebmar* rule and set aside an election which was favorable to a union. Consistency requires us to apply the same standards here adversely to the Company. The court in *Clarytona* found the *Allied* rule inapplicable under the facts of that case, since no official Board document had been used.

In light of these holdings we are bound to conclude that the use of this type of information under the surrounding circumstances might have had an undesirable impact on the employees' freedom of choice.

We have considered the several other contentions urged by the Company and find them unpersuasive. We hold that the Board did not err in setting aside the first election.

II.

The second and subsidiary issue is whether the Board properly established a new voter eligibility list to include unit employees "employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election." The effect of the changed eligibility date was to include newly hired employees who were unable to vote in the first election.

The Company points out that after the first election it hired 48 new employees prior to the second election. Fifteen of these were required as a result of expansion in the production unit and 33 were the result of normal turnover of employees. The Company complains that this is contrary to the Board's policy in runoff elections, where there are more than two parties and no party receives a majority. It argues that the use of a new eligibility list gives the Union an unfair advantage in opening up the opportunity for manipulation of such newly hired employees. It also urges that the new employees could not know the reason why the first election was set aside. We find these arguments unpersuasive.

It is well settled that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.,* 329 U.S. 324, 330 (1946); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 767 (1969); *NLRB v. Clarytona Manor, Inc.,* 479 F.2d 976, 979 (1973).

We have considered the arguments of prejudice advanced by the Company. However, on balance, we conclude that the determination of the new eligibility date and the enfranchisement of the new employees come within the wide discretion given the Board. We find no adequate

showing of abuse of discretion. We conclude that the new eligibility date best effectuates the policy of the Board to provide all affected employees a freedom of choice.

We hold that the Board properly established a new voter eligibility list for the second election.

Accordingly, the petition of the Company for review will be denied and the cross-petition of the Board for enforcement will be granted.

REVIEW DENIED
ENFORCEMENT GRANTED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

(NO. 72-2001)

APPENDIX

Regency ELECTRONICS, INC.

THIS IS ONLY A SAMPLE BALLOT PREPARED BY THE COMPANY. WHEN YOU VOTE THE OFFICIAL BALLOT WILL BE HANDED TO YOU BY THE N. L. R. B. REPRESENTATIVE AT THE ELECTION ON FRIDAY, DECEMBER 17, 1971.

Vote NO and pay NO dues

Vote NO and have NO strikes

Vote NO and walk NO picket lines

Vote NO and have NO hate campaigns

Vote NO and have NO fighting

Vote NO and have NO troubled times

WE HOPE YOU WILL GIVE US YOUR VOTE OF CONFIDENCE SO THAT WE CAN CONTINUE TO PULL TOGETHER....NOT APART.

UNITED STATES OF AMERICA
National Labor Relations Board
OFFICIAL SECRET BALLOT
SAMPLE
FOR CERTAIN EMPLOYEES OF
REGENCY ELECTRONICS, INC.

Do you wish to be represented for purposes of collective bargaining by -

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
AFL-CIO, CLC ?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES ☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

7

EXHIBIT A

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 14, 1974

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. A. SHERMAN CHRISTENSEN, *Senior District Judge**

No. 72-2001 REGENCY ELECTRONICS, INC., *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

ORDER

This matter is now pending before the court upon petitioner's supplement to its petition for rehearing *in banc,* respondent's answer thereto, and petitioner's reply. As to petitioner's suggestion for a rehearing *in banc,* it now appears that no active member of this court has requested that a vote be taken thereon.

However, in light of the decision of the Supreme Court of the United States in *National Labor Relations Board v. Savair Manufacturing Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), subsequent to our decision in the

instant case (Dec. 3, 1973), it is now ordered that further proceedings herein be stayed until the further order of this court pursuant to the following remand:

This case is now remanded to the respondent, National Labor Relations Board, for the purpose of conducting a hearing on petitioner's Objection 4 to the results of the second election held March 24, 1972, as alternatively requested by the Labor Board in its above mentioned answer; and thereafter the Labor Board shall certify to this court its findings and conclusions as determined therein.

JD—620—74
Indianapolis, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

REGENCY ELECTRONICS, INC.

and Case No. 25—CA—5134

INTERNATIONAL UNION OF
ELECTRICAL, RADIO AND MACHINE
WORKERS, AFL-CIO

RALPH R. TREMAIN, ESQ., of
Indianapolis, Ind., for the
General Counsel.

E. TIMOTHY QUINO, ESQ., and
RICHARD P. TINKHAM, JR., ESQ.,
of SOMMERS, TINKHAM, BARNARD &
FREIBERGER, of Indianapolis, Ind.,
for the Respondent.

DONALD E. FOULKE, ESQ., of Indianapolis,
Ind., for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This supplemental proceeding arises from an 8(a)(5) complaint based upon Respondent's alleged refusal to bargain with a newly certified labor organization and is limited to a renewed consideration of Respondent's objection 4 to conduct affecting results of a second election conducted by

the Board on March 24, 1972 in Case 25-RC-4811.[1] The supplemental hearing was held before the undersigned in Indianapolis, Indiana on July 23, 1974, pursuant to the Board's ORDER REOPENING RECORD AND REMANDING PROCEEDING TO REGIONAL DIRECTOR FOR HEARING, dated May 21, 1974, which, in turn, was pursuant to an order of the United States Court of Appeals for the Seventh Circuit, dated March 14, 1974, remanding for a hearing on said objection. After close of the supplemental hearing, briefs were filed by the General Counsel and Respondent.

I. Background

The Union filed a petition in Case 25-RC-4811 on October 20, 1971 and pursuant thereto an election was conducted on December 17, 1971 in the appropriate unit, with the Union failing to be designated as exclusive bargaining representative by a majority of employees casting valid ballots.[2] Pursuant to the Union's timely filed objections, the Board on February 25, 1972, set aside said election and directed a second election. On March 24, 1972, the second election was conducted, with the results showing that of 257 eligible voters, there were 10 void ballots, and 133 votes were cast for, and 112 against, the Union with no challenged ballots. Thereafter, the Employer filed timely objections to the conduct of the second election, including *inter alia,* its objection 4, which reads as follows:

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1 Official notice is taken of the record in the underlying representation proceeding, Case No. 25-RC-4811, as the term record is defined in Sections 102.68 and 102.09(f) of the Board's Rules and Regulations, Series 8 as amended.

2 The results of the first election showed that of 242 eligibles, 104 cast ballots for, and 117 cast ballots against the Union. There were 12 challenged ballots which could not affect the results.

> The Union coerced and intimidated the employees by threatening economic harm if the union authorization cards were not signed, and the Union also promised discriminatory benefits if employees did sign cards by offering to waive all initiation fees and dues for only those who executed authorization cards.

Thereafter, the Acting Regional Director for Region 25 issued a Report on Objections and Recommendations to the Board, overruling all of Respondent's objections, and recommending that the Union be certified as exclusive bargaining representative, stating specifically with respect to objection 4:

OBJECTION 4

In support of Objection 4, the Employer proffered a single witness who it alleges was told by the Union that she would not have to pay union fees of any nature whatsoever if she signed a union authorized card, but would be required to pay union dues and initiation fees if she did not sign a card. That witness states "One of them then asked me if I had signed my union authorization card and I said I had and had already mailed it in. Then he told me that I wasn't obligated to pay any initiation fees because I had already signed the card. Then he said that those that hadn't signed up would have to pay a $25.00 initiation fee and that I wasn't obligated to pay this $25.00 fee. That was all said about the money part. They didn't say anything about union dues. This was the only conversation I had with anyone for the Union about paying money to the Union." The waiver of initiation fees during an organizational campaign does not constitute objectionable conduct. *DIT-MCO, Incorporated,* 163 NLRB 1019. Accordingly, it is recommended that Objection 4 be overruled.

Respondent filed timely exceptions to the report of the Acting Regional Director, and on August 1, 1972, the Board issued a Supplemental Decision and Certification of Representative which adopted *en toto* the Acting Regional Director's recommendations and certified the Union as exclusive representative of employees in the appropriate unit.

Thereafter, Respondent refused to recognize and bargain with the Union, electing instead to pursue its challenge to the validity of the certification issued in Case 25-RC-4811, based on various grounds, including the overruling, without a hearing, of its objection 4.

On November 30, 1972, the Board issued a Decision and Order in the above-entitled proceeding, finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as certified bargaining representative of employees in the appropriate unit.[3]

Enforcement proceedings, opened in the United States Court of Appeals for the Seventh Circuit, resulted, on December 10, 1973, in the entry of a judgment, enforcing the aforesaid Order of the Board. Thereafter, however, in light of the decision of the Supreme Court of the United States in *N.L.R.B. v. Savair Manufacturing Co.,* 414 U.S. 270 (December 17, 1973), the Seventh Circuit ordered that further proceedings on its judgment be stayed, pending a hearing on Respondent's Objection 4.

II. The Issue

In *N.L.R.B. v. Savair Manufacturing Co., supra,* the Supreme Court, on reasoning which appeared predicated upon the specific facts in that case, declined to approve

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3 200 NLRB No. 88.

longstanding Board policy that a union waiver of initiation fees to those employees who sign authorization cards before a representation election does not, under any circumstance, raise a material issue affecting the validity of an election.

By virtue of that decision, it is now necessary to reconsider Respondent's objection 4, and determine, first, whether in fact the Union in this case made such offers, and if so whether the offered waivers of membership fees were made under circumstances invalidating the second election. Should objection 4 ultimately be found meritorious the previous Order of the Board in this case will be vacated, and Case No. 25-RC-4811, reopened to enable resolution of the question concerning representation through the conduct of a third election.

III. Conclusions

At all times material, the Union's established policy exempted all employed on the date of the election from payment of initiation fees irrespective of when they signed a card or otherwise attained membership status. This policy was plainly lawful,[4] and Respondent concedes both as to the existence and legitimacy thereof. Nonetheless, Respondent contends that agents of the Union, during the preelection period, departed therefrom, engaging in conduct leading employees to believe that initiation fees would be waived only as to those who executed authorization cards before the election. In support of its position, Respondent cites *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB No. 73, where the Board, despite a similar across-the-board initiation fee exemption, nonetheless set aside an election, where conduct by union agents created an ambiguity whereby employees might well have believed

4 See *Savair, supra* ,414 U.S. at 272-273, fn. 4.

that preelection membership was necessary to avoid such payments.

As the party seeking to set aside the election, the onus is upon Respondent to prove an unlawful interference therewith. To meet that burden, several witnesses were offered who gave testimony to the effect that employee organizers made statements generally to the effect that only preelection card signers would be exempted from initiation fees.

Before treating with the specifics of this testimony, I note that the *Savair* issue in this cases arises in a somewhat unusual context; for, as will be seen, *infra*, the obligation to pay initiation fees was raised by antiunion factions as part of their propaganda to persuade employees to reject the Union. It is in this light that the evidence offered in support of the objection must be evaluated.

Thus, Marsha Schoonover, a witness called by the Respondent, conceded that she was an antiunion employee who during the preelection period organized a club to see what could be done "to stop the Union." As part of this effort, Schoonover, in her own words, ". . . had been writing letters to get girls to quit signing the cards, to get their names off the cards, so they wouldn't have to pay initiation fees." Schoonover's testimony reveals that she was of the view that only card signers would be liable for initiation fees, and it is also clear that she siezed upon her conviction in that regard as a means of persuading card signers to repudiate their designations. Nonetheless, she gave testimony which is cited by Respondent as evidencing an improper waiver offer by an alleged union agent. Thus, according to Mrs. Schoonover, who at the time was known to be antiunion, in a conversation with Marge Bodily, a member of the Union's inplant organizing committee, Schoonover was asked by Bodily why she had

been writing letters to get girls to quit signing cards and to get their names off cards. Bodily also asked Schoonover if she knew anything about the cards. Schoonover said she didn't and stated that she wouldn't sign a card because she ". . . was against the union and I didn't want to pay an initiation fee." Bodily then said "Well, you won't have to pay an initiation fee."[5]

In context, the statement attributed to Bodily was not inconsistent with the Union's comprehensive policy regarding waiver of initiation fees. Far from any design to induce execution of a card, Bodily's remark, in the circumstances, was uttered to counter antiunion propaganda that card signers would be liable for such fees, and could only be understood as such.

That Bodily was not the only member of the inplant organizing committee who undertook to refute such propaganda is evident from the cross-examination of Ronald Hanna, another witness offered by the Respondent in support of its objection. Thus, according to Hanna, he was

5 This is the only statement Schoonover attributes to Bodily which I credit. As to matters prejudicial to the Union in other respects, I regard Mrs. Schoonover as totally incredible. It is my distinct impression that Schoonover held a deep resentment towards the Union, which allowed her to be carried away on the witness stand in her zeal to damage the Union's cause. The original version of her conversation with Bodily, on requestioning by Respondent's counsel, was transformed by Schoonover into a totally different episode, which plainly was tailored to support the Employer's position, but which considered against her known antiunion history was plainly unbelievable. Other matters indicative of Schoonover's unreliability are (1) her inherently unlikely testimony that union supporters probably instilled the belief among employees that card signers would be liable for initiation fees, and (2) that the Union did not solicit cards before the first election, but was actively engaged in such an effort only prior to the second election.

aware of confusion in the plant regarding initiation fees, and that employees were showing disbelief that they would not have to pay initiation fees if they signed a card. He testified that he overheard conversations between employees and Alice McVay, Chairman of the employee organizing committee, in which she attempted to assure employees that no such liability would ensue by stating "if you sign the card there'll be no initiation fee." Here again, I see nothing in McVay's statement other than what, in context, would be construed as a responsive argument, countering antiunion propaganda which had already taken hold upon employees. The testimony of Mildred Parham attests to the belief held by employees that execution of a card would render them liable for initiation fees. According to Parham, Reba Campbell in the late summer of 1971, in soliciting Parham's execution of a card told the latter that, as to initiation fees, ". . . there would be none if [Parham] signed the card." However, according to Parham, she didn't sign the card because she did not believe Campbell.

From the foregoing, it is plain that the issue of initiation fees was utilized by antiunion factions to influence others not to execute cards or to revoke them if already signed. Several of Respondent's witnesses, including Parham, Hanna, Marsha Schoonover, Alvin Schoonover, and Ben Wall testified that many employees held the belief that they would have to pay initiation fees even if they signed cards. Mrs. Schoonover admits that employees believed that execution of a card would render them liable for such payments, and that she relied upon such belief as a means of stopping the Union, endeavoring to assist such employees by drafting card revocation letters on their behalf. Against this background I am unpersuaded by the testimony that the statements imputed to Bodily, McVay, and

Campbell, assuming that their actions were binding upon the Union, constituted offers of initiation fee waivers of the type condemned by *Saviar*.[6] There is a vital distinction between inducements to encourage execution of cards, and efforts to neutralize antiunion propaganda which would

6 The credited statements attributed to Union organizers are limited to those set forth in the above text, as made by Campbell, Bodily and McVay. I have heretofore discredited the alternative versions of a conversation between Mrs. Schoonover and Bodily. I also discredit the testimony of Janet Healy ,who related that Lila Martin, Sue Campton, Campbell and Eva Elmore, informed her that if she signed a card before the election she wouldn't have to pay initiation fees. I was not impressed with Healy's demeanor, and at least in two respects her veracity is rendered highly suspect. Thus, Healy, in efforts to place these conversations as within the critical preelection period, initially insisted that they occurred between the first and second elections. However, Healy was forced to recant on this testimony, when, on cross-examination she was confronted with an authorization card which she had executed on April 13, 1971, long prior to the filing of the petition, and, indeed, the first election. Further concern for the reliability of her account, arises from her response to the initial questioning by Respondent's counsel as to the specifics of what she had been told by Martin, Campbell, Elmore and Campton. Thus, Healy was told to pick one of these latter individuals and state "what she said to you and what you said to her regarding initiation fees." Healy was hardly responsive, prefacing her answer, as follows ". . . it's my understanding that we had to sign the card—." After objection by the General Counsel, and a cautioning of the witness that she was to answer in terms of what specifically had been said, Healy testified that all four told her that "if we signed the card before the election we wouldn't have to pay initiation fees." If such statements were made, I cannot imagine why Healy chose initially to relate her understanding of the Union's position, since this understanding hardly could have been at variance with her latter testimony as to what was actually said. I regard this latter testimony as incredible. Because of a strong suspicion that Healy was intent on giving whatever testimony was necessary to aid Respondent's case, insofar as it is prejudicial to the Union, her testimony is regarded as unreliable and of no value in assessing the issues involved here.

tend to discourage union membership. *Savair* in no sense limits the Union's right to act on its legitimate concern for the refutation of damaging propaganda. In the context, the statements attributed to McVay, Campbell and Bodily fell within the latter category, and fail to furnish a basis for disturbing the results of the second election.

Respondent further supports its claim of election interference, pointing to the Union's use of "charter membership" cards, in the course of the organizational campaign. The card is a two-sided document, with a facsimile of each side appearing as follows:

CHARTER MEMBERSHIP CARD

This is to certify that:

_____

(Name of Charter Member)

has, during an organizational drive at _____ located at _____ signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.

_____ _____

(Secretary-treasurer) (International President)

• • • • •

IUE-AFL-CLC
CHARTER MEMBER SEAL
EXEMPTION
from
Initiation
Fee
THIS CARD IS VALUABLE—KEEP IN YOUR WALLET[7]

7 An image of this side of the card was imposed on the face of a letter dated November 11, 1971, from the Interna-

In *Inland Shoe Manufacturing Co., Inc., supra,* the Board regarded the offer of charter memberships, together with a statement, "That there are no initiation fees for charter members of a new local . . ." as creating an ambiguity with respect to the Union's uncommunicated, blanket exemption to all employed on the date of the election. The use of the charter membership card in the instant case, as Respondent contends, through the message on the card itself, tended to create the same impression as in *Inland Shoe, supra.*

On the other hand, the present case is distinguishable from *Inland Shoe* in material respects. In that case, the Board sustained the *Savair* type objection, finding that because the Union had created an ambiguity as to its waiver policy, the Union had a duty to clarify any resulting confusion. The Union's failure to do so left the charter membership offer as ". . . the kind of preelection offer of initiation fees condemned by the Supreme Court in *Savair,*" 211 NLRB No. 73, at p. 6.

Unlike *Inland Shoe,* I am satisfied that the Union in this case, prior to the second election, clearly and unequivocally communicated to employees that no employees in the unit would be liable for initiation fees. As far as this record discloses, the charter membership cards, were given only to those employees who had previously executed authorization cards. The credible evidence establishes that after the first election, the Union ceased soliciting authorization

7 (cont.)

tional Union's secretary-treasurer to the Union's field representative, Charles Ziegler, granting the latter's earlier request for an exoneration of Respondent's employees from initiation fees. Copies of this letter in this form were distributed as handbills at the gates of Respondent's plant on or before December 14, 1971.

cards.[8] Hence it does not appear that charter membership cards were utilized by the Union in the period between the first and second elections. Nor does the credible evidence reflect that the matter of initiation fees was discussed by any organizer during that period. Indeed, on this record the only reference to initiation fees made between the first and second election is that contained in a Union leaflet mailed on or about March 9, 1972 to all employees who appeared on the "*Excelsior* list" for the second election. That leaflet was drafted in question and answer form and states as follows:

> Q. WILL I HAVE TO PAY AN INITIATION FEE IF THE UNION IS VOTED IN?
>
> A. ABSOLUTELY NOT! ANYONE PRESENTLY WORKING AT REGENCY IS HEREBY GUARANTEED THAT THEY *WILL NOT* PAY ANY INITIATION FEE.

In my opinion the above leaflet satisfied any duty imposed upon the Union to clarify ambiguities that may have arisen from the charter membership cards utilized during the campaign preceding the first election. The terms of the statement in the leaflet are clear and would dispel

8 Based on the credited testimony of Ernest J. Rutherford, the Union's District 8 Coordinator, who conducted the campaign which preceded the second election, I find that the Union did not solicit any authorization cards after the first election. Since, as Rutherford relates, a question concerning representation already existed, there was no need for such an effort prior to the second election. I have heretofore discredited the testimony of Martha Schoonover, who indicated that cards were solicited prior to the second election, but not during the period preceding the first. This aspect of Schoonmaker's testimony is not only inherently improbable, but conflicts with that of Healy and Parham, both of whom acknowledged that cards were solicited of them well prior to the filing of the petition. No other witnesses testified to any card solicitation or discussion of the initiation fee issue by employee organizers after the first election.

any reasonable understanding among employees that those who fail to sign cards before the election will be liable for initiation fees. The Union could rightfully assume that this expression, having been distributed to all eligible voters designated on the *Excelsior* list, would reach all employees who may have been confused as to initiation fee liability, so as to enable them to go to the polls with a clear understanding that the Union's initiation fee practice did not discriminate against those who did not demonstrate pre election allegiance to the organizational effort. The fact that during the period between the elections, the Union was not soliciting cards and the absence of evidence that the Union or its agents informed employees either directly, or through implication, that nonsigners would be liable for such fees, contributes further to the effectiveness of the clarification of Union policy appearing in the March 9, 1972 leaflet. Ergo, I am persuaded that the Union effort to reverse the results of the first election was devoid of any effort "to buy endorsements and paint a false portrait of employee support during its campaign," and that the Union did not seek to capitalize on ". . . some employees who would feel obligated to carry through on their stated intention to support the Union." *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. at p. 277 and 278.

While it is my conclusion that the effects of any ambiguities were erased prior to the second election, and that *Inland Shoe* is distinguishable for that reason,[9] a further ground exists for deeming objection 4 as lacking in merit. As indicated, the only misconduct which the credible evidence attributes to the Union was its use of charter membership cards, and its indications that charter membership status entailed an exemption from initiation fees. Said

9 On the same basis, I also distinguish the Board's recent decision in *Coleman Co.*, 212 NLRB No. 129.

offers of charter memberships and references thereto were confined to the period preceding the first election, and were not renewed thereafter. In accordance with established Board policy, the critical period for considering interference with a second election begins running from the date of the first election, and the Board will not set aside an election on the basis of events occurring prior thereto. The *Singer Company, Wood Products Division*, 161 NLRB 956, fn. 2. As the cutoff date for consideration of objectionable conduct in this case was December 17, 1971, the date of the first election, and since there is no evidence that charter memberships were referred to thereafter, I find reliance thereon as a basis for challenging the second election to be time-barred under long established Board policy.[10] Although it is appropriate to consider such

10 Respondent, in arguing, that the cutoff rule should not be applied herein, cites *Weather Seal, Inc.*, 161 NLRB 1226. I construe that decision as inapposite here. That case involved a unique situation in which a labor organization, though found to have been unlawfully assisted on the basis of precritical period unfair labor practices, appeared on the ballot in the election. In setting aside that election, the Board did not rely on the unfair labor practices themselves, but rather upon the participation in the election of the unlawfully assisted union. It was the Board's holding, that in view of the assisted union's participation in the election, prior to the remedying of the unfair labor practices, ". . . it cannot be said that the election was fairly and properly conducted or that the results of the election represent the freely expressed desires of the employees." *Weather Seal* does not authorize the type of wholesale abrogation of the cutoff date rule which Respondent urges upon me here.

Respondent's reliance upon *N.L.R.B. v. R. Dakin and Company* (C.A. 9), 477 F.2d 492 is also regarded as unpersuasive. Even if the Board were to adhere to the Court's relaxed approach to the cutoff date rule, I see no compelling circumstances in this case which would overcome the remoteness of the credited evidence on which Respondent must rely in its effort to set aside the second election herein.

evidence as relevant background in which subsequent events might be viewed,[11] here the Union, during the critical period preceding the second election, engaged in no improper reference to initiation fee liability and hence any vitality in the charter membership issues was put at rest with the first election.

Accordingly, I find that Respondent has not established that the Union, during the critical period preceding the second election, improperly induced employees to execute cards by promising them an exemption from initiation fees. In so finding I rely upon the clarification of union policy respecting initiation fees appearing in the March, 1972 leaflet. In the alternative, I would reach that same result on the ground that, under the Board's preelection cutoff date policy, the Union's conduct prior to the first election, which was not revived thereafter, cannot be regarded as an interference with the second election. For these reasons, I find that Respondent's objection 4 to the second election is lacking in merit and I shall recommend that it be overruled.

Based upon the foregoing, including the entire record in this proceeding, I hereby issue the following recommended:

ORDER[12]

Pursuant to Section 10(c) of the Act, Employer objection 4 to the second election conducted on March 24, 1972 in

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11 See e.g. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Co.)*, 366 U.S. 411.

12 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Case 25-RC-4811 is hereby overruled, and the Order of the National Labor Relations Board dated November 30, 1972, is hereby reaffirmed, with Respondent, Regency Electronics, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, ordered to take the action set forth therein.

Dated at Washington, D.C., Sept. 20, 1974.

/s/ JOEL A. HARMATZ

Joel A. Harmatz
Administrative Law Judge

215 NLRB No. 157 FJP

D—9451

Indianapolis, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGENCY ELECTRONICS, INC.

and Case 25—CA—5134

INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER[1]

On September 20, 1974, Administrative Law Judge Joel A. Harmatz issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, General Counsel filed briefs in support of the Administrative Law Judge's Supplemental Decision and in response to Respondent's exceptions, and the Union filed a brief in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

1 The original Decision and Order of the Board was issued on November 30, 1972, and is reported at 200 NLRB 625.

cided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Regency Electronics, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., Dec. 23, 1974.

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

2 We do not adopt that part of the Administrative Law Judge's Decision which rests on the proposition that the critical period for considering evidence offered to support the Employer's objection describing a union waiver of initiation fees, as condemned by the Supreme Court in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), began with the date the first election was held. See *Gibson's Discount Center, a Division of Scrivner-Boogaart, Inc.*, 214 NLRB No. 22 (1974). We agree, however, with the Administrative Law Judge that, even considering that evidence, the totality of the Union's conduct in this instance did not result in the type of waiver found objectionable by the Court in *Savair, supra.*

3 The Respondent's request for oral argument is hereby denied as the record and exceptions in our view adequately present the issues and positions of the parties.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 72-2001

REGENCY ELECTRONICS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED SEPTEMBER 8, 1975 — DECIDED OCTOBER 3, 1975

Before CASTLE, *Senior Circuit Judge,* and SWYGERT and PELL, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Regency Electronics, Inc. ["the Company"] petitions this court to review an order of the National Labor Relations Board directing it to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-CIO ["the Union"]. The Board filed a cross-application for enforcement of its order and

the Union intervened. The Company does business in Indianapolis, Indiana, and jurisdiction is therefore proper under 29 U.S.C. § 160 (e) (1970). We enforce the Board's order.

On December 17, 1971 the Board conducted an election ["first election"] at the Company in which a majority of the votes cast were against the Union. This election was subsequently set aside by the Board due to misconduct by the Company and a new election ["second election"] ordered. The second election, held on March 24, 1972, resulted in a Union victory. The Company filed 12 objections to the conducting of this election, the fourth of which alleged that the Union had

> promised discriminatory benefits if employees did sign cards by offering to waive all initiation fees and dues for only those who executed authorization cards.

After an evidentiary hearing, the Board overruled the Company's objections and certified the Union. 200 N.L.R.B. 625 (1972).

The Company refused to bargain with the Union in order to obtain judicial review of the Board's findings in the representation proceedings. The Board found it in violation of §§ 8 (a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158 (a) (5) and (1) (1970), and the Company sought review in this court. On December 3, 1973 this Court denied the Company's petition for review and enforced the Board's order. 499 F.2d 1129 (7th Cir. 1973).

However, while the Company's petition for rehearing and suggestion for rehearing en banc was pending before this court, the Supreme Court decided *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair* the Court held that pre-election waivers of initiation fees which were granted only to those employees who joined the union

before an election were coercive and unjustly allowed a union to "buy endorsements and paint a false portrait of employee support during its election campaign." *Id.* at 277. Since the Company's fourth objection had questioned the Union's waiver of initiation fees, this court stayed the proceedings before it and remanded the case to the Board to conduct a hearing on the question. 499 F.2d at 1135.

On remand,[1] the hearing before the Administrative Law Judge ["the ALJ"] disclosed that the Union had an established policy of exempting all employees employed at the time of an election regradless of whether such employee formally joined the Union before or after the election. In the campaign drive preceding the first election at the Company, the Union distributed "charter membership" cards to employees who had previously signed authorization cards. On the front of the cards appeared the following language:

> IUE-AFL-CLC
> CHARTER MEMBER (SEAL)
> Exemption
> from
> Initiation
> Fee
>
> THIS CARD IS VALUABLE—KEEP IN YOUR WALLET

On the reverse side, the card read:

> CHARTER MEMBERSHIP CARD
> This is to certify that:
>
> _____
> (Name of Charter Member)

1 The Administrative Law Judge's Supplemental Decision appears following the Board's Supplemental Decision and Order at 215 N.L.R.B. No. 157 (1974).

> has, during an organizational drive at *Regency* located at *Indianapolis* signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.
>
> */s/ David J. Fitzmaurice* — Secretary-Treasurer
> */s/ Paul Jennings* — International President

The evidence presented at the hearing disclosed that approximately 50 of these cards were handed out prior to the first election.[2] No cards were distributed during the interval between the two elections, but nonetheless the ALJ found that the meaning of the cards and exactly who would be exempted from the payment of initiation fees was apparently the subject of considerable confusion among the Company's employees.[3] Due to this, the Union mailed a leaflet to all employees on March 9, 1972, fifteen days before the second election. The leaflet included the following language:

> Q. WILL I HAVE TO PAY AN INITIATION FEE IF THE UNION IS VOTED IN?
>
> A. ABSOLUTELY NOT! ANYONE PRESENTLY WORKING AT REGENCY IS HEREBY GUAR-

2 Charles Ziegler, a Union field representative who took part in the first election campaign at the Company, testified that after he ran out of charter membership cards, he distributed copies of a letter from the International Union granting an "exoneration for the present employees at Regency Electronics, Inc. located in Indianapolis, Indiana, from initiation fees when they join the IUE." The letter was distributed to employees on December 14, 1971, three days before the first election.

3 The ALJ found that much, if not all, of this confusion was the product of anit-union propaganda.

ANTEED THAT THEY *WILL NOT* PAY ANY INITIATION FEE.

Relying primarily on this leaflet, the ALJ concluded that any confusion or ambiguity surrounding the Union's waiver policy was corrected and therefore upheld the second election.[4]

During the time while the case was before the ALJ, Board policy called for the application of a "cutoff date rule" in evidentiary hearings barring consideration of certain evidence deemed "too remote." Under that rule as applied in the election context, improper conduct which occurred prior to a first election would not be considered in assessing the validity of a subsequent second election. *See Singer Co., Wood Products Division,* 161 N.L.R.B. 956, n.2 (1969). However, between the time the ALJ ruled on the instant case and its subsequent review and adoption by the Board, the Board discarded the cutoff rule in cases involving alleged *Savair* violations. *Gibson's Discount Center, a Division of Scrivner-Boogaart, Inc.,* 214 N.L.R.B. No. 22 (1974). Furthermore, Board precedent at the time the ALJ was deciding the instant case allowed the fact-finder to consider an alleged *Savair* violation in the context of later clarifying conduct in order to find a waiver offer was not improper under *Savair. See Smith Co. of California,* 215 N.L.R.B. No. 97 (1974); *Western Refrigerator Co., Subsidiary of the Hobart Manufacturing Co.,* 213 N.L.R.B. No. 40 (1974).

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4 The ALJ found that *Inland Shoe Manufacturing Co.,* 211 N.L.R.B. No. 73 (1974), relied on by the Company, did not require a different result. The Board in *Inland Shoe* found that the union's failure to clarify its ambiguous initiation fee waiver policy amounted to a *Savair* violation. In the instant case, the ALJ found that the duty to clarify its ambiguous policy had been fulfilled by the Union by the March 9 leaflet and other clarifying statements.

It is the primary contention of the Company on this appeal before us that the Board erred in adopting the ALJ's recommended order. The Company argues that the Board incorrectly read the ALJ's decision as resting on alternative grounds: the first based on all the evidence, including the pre-first election cards, and the second applying the cutoff rule and based only on evidence of conduct occuring [sic] after the first election.[5] It is the Company's contention that the ALJ employed the cutoff rule in arriving at *both* grounds for decision thus barring his consideration of the charter membership cards.[6] Therefore, the Company insists, because the Board had previously discarded

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5 In a footnote to its Supplemental Decision, the Board stated:

> We do not adopt that part of the Administrative Law Judge's decision which rests on the proposition that the critical period for considering evidence offered to support the Employer's objection describing a union waiver of initiation fees, as condemned by the Supreme Court in *N.L.R.B. v. Savair Manufacturing Co.,* 414 U.S. 270 (1973), began with the date the first election was held. See *Gibson's Discount Center, a Division of Scrivner-Boogaart, Inc.,* 214 NLRB No. 22 (1974). We agree, however, with the Administrative Law Judge that, even considering that evidence, the totality of the Union's conduct in this instance did not result in the type of waiver found objectionable by the Court in *Savair, supra.* [Board's opinion at 2, n.2.]

6 The Company insists that the ALJ employed the cutoff rule in his first "all evidence" ground for decision relying primarily on the ALJ's use of the term "critical period." *See* ALJ's opinion at 11 (emphasis added):

> Accordingly, I find that Respondent has not esablished [sic] that the Union, during *the critical period* preceding the second election, improperly induced employees to execute cards by promising them an exemption from initiation fees.

We think that it is clear from the total context of the ALJ's decision that as used in this passage, the term "critical period" included the time before the first election.

the cutoff rule in *Savair* cases, it was required to remand the case back to the ALJ for his consideration of the pre-first election cards in arriving at his decision.

The Board possesses wide latitude in its review and adoption of decisions and recommended orders of those who conduct its hearings. We cannot find that the Board has erred unless our reading of the ALJ's decision discloses that the Board's interpretation is clearly unfounded. *Cf. Plumbers Local No. 519 v. NLRB,* 416 F. 2d 1120, 1123 (D.C. Cir. 1969); *NLRB v. Fishermen's Union of San Pedro,* 374 F. 2d 974, 978 (9th Cir. 1967).

A reading of the ALJ 's decision makes it abundantly clear to us that the ALJ first considered all of the evidence including the charter membership cards in deciding that, taken in total context, the cards and other Union conduct did not amount to a *Savair* violation. It is clear to us that in so doing, he did not employ the cutoff rule. It is also clear to us that ALJ's second ground, which employed the cutoff rule, was an alternative ground for decision. The following language from the ALJ's decision bears this out:

> In my opinion the above [March 9] leaflet satisfied any duty imposed upon the Union to clarify ambiguities that may have arisen from the *charter membership cards utilized during the campaign preceding the first election.* The terms of the statement in the leaflet are clear and would dispel any reasonable understanding among employees that those who fail to sign cards before the election will be liable for initiation fees . . .
>
> While it is my conclusion that the effects of any ambiguities were erased prior to the second election and that *Inland Shoe* is distinguishable for that reason, *a further ground exists for deeming objection 4 as lacking in merit.* . . . Said offers of charter memberships and references thereto were confined to the

> period preceding the first election, and were not renewed thereafter. In accordance with established Board policy, the critical period for considering interference with a second election begins running from the date of the first election, and the Board will not set aside an election on the basis of events occuring [sic] prior thereto. . . . As the cutoff date for consideration of objectionable conduct in this case was December 17, 1971, the date of the first election, and since there is no evidence that charter memberships were referred to thereafter, I find reliance thereon as a basis for challenging the second election to be time-barred under long established Board policy. [ALJ's opinion at 9-10 (emphasis added)].

Since the ALJ clearly based his decision on two alternative grounds, we cannot say the Board erred in adopting the decision on the first ground. The Board made it clear it was not adopting the cutoff rule based ground for decision.

The Company further argues that regardless of whether the charter membership cards constituted a *Savair* violation, the Union misrepresented its initiation fee policy in such a way that the second election must be set aside.

The ALJ found that the Union's longstanding and established policy was to waive initiation fees for all employees of a company employed at the time of the election regardless of whether the employees joined the Union before or after the election. In light of this, the Company argues that the statement on the cards that "THIS CARD IS VALUABLE—KEEP IN YOUR WALLET" constitutes an "offer of a non-existent benefit." The misrepresentation exists, it contends, because of the Union's established policy was to waive the fee for all employees as a matter of course and becoming a "charter member" therefore conferred no additional benefit to make the card "valuable." Assuming that the card accurately portrayed

the Union's waiver policy, we cannot say that the possession of such a membership card was not of some "value" to its holder so to conclude that its declaration that "THIS CARD IS VALUABLE" constituted a misrepresentation.[7]

Accordingly, the Company's petition for review is denied and the Board's cross-application for enforcement is granted.

ENFORCEMENT GRANTED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

7 In its brief before this court, the Company advanced a third argument that the proceedings before the Board were "tainted" by the receipt of ex parte communications in the form of letters from the Union's counsel and a United States Senator in violation of the Board's own rules, 29 C.F.R. § 102.126 (1966). Whatever the propriety of these communications, the letters were made available to the Company and the Company has not been able to demonstrate how it was injured. At oral argument counsel for the Company indicated it was not pursuing the issue further.

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. §§ 500-706 (1975) are as follows:

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641 (b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

• • • • •

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy;

or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

• • • • •

(6) the certification of worker representatives . . . .

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1975) are as follows:

§ 156. National Labor Relations Board—rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

• • • • •

§ 160. Prevention of unfair labor practices

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause

to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the

Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to

the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board

with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set

aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1067

REGENCY ELECTRONICS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (herein the "Union"), whose certification by the National Labor Relations Board was sustained by the court below, opposes the granting of a writ of certiorari in this case.

QUESTIONS PRESENTED

1. Whether the Board properly found that the sample ballot circulated by the employer warranted the setting aside of the first representation election.

2. Whether the Board properly found that the Union's waiver of initiation fees did not warrant the setting aside of the second representation election.

STATEMENT

An election conducted by the Board on December 17, 1971, hereinafter called the first election, was set aside by the Board and a new election was ordered because of misconduct of the employer in distributing to employees prior to the election a sample ballot which reasonably led employees to believe that the government was urging them to vote against the Union (App. 3-4, 19, 42, 56-60).

A second election was conducted by the Board on March 24, 1972 and resulted in certification of the Union (App. 36-38), followed by unfair labor practice proceedings against the employer, and the order to bargain (App. 39-50) which, in earlier proceedings before the court below, hereinafter called *Regency I,* was enforced (App. 53-62). After this Court's decision in *N.L.R.B.* v. *Savair Mfg. Co.,* 414 U.S. 270 (1973), the court below granted rehearing, stayed further proceedings before the court, and remanded this case to the Board for the purpose of conducting a hearing on the employers' objection to the second election which related to waiver of initiation fees, with directions to the Board to certify to the court its findings and conclusions as determined upon the hearing (App 64-65).

The Board thereupon conducted the hearing as directed and issued a supplemental decision (App. 66-80)

overruling the employer's objection to the second election and reaffirming its order to the employer to bargain with the Union (App. 80-81). The Board found that the Union had an established policy, and so informed all employees, that initiation fees were waived for all employees working at the time of the election, whether or not they signed membership cards or otherwise joined the Union (App. 77-78). The Board accordingly determined that "the totality of the Union's conduct in this instance did not result in the type of waiver found objectionable by the Court in *Savair*" (App. 83, fn. 2).

The court below, in proceedings hereafter called *Regency II,* reviewed the Board's supplemental decision and enforced the Board's order (App. 84-92).

REASONS FOR GRANTING THE WRIT

1. The petition does not present any questions deserving of review by this Court. The opinion below correctly interprets and applies this Court's decision in *N.L.R.B.* v. *Savair Mfg. Co.,* 414 U.S. 270 (1973). There this Court ruled that "permitting the union to offer to waive an initiation fee for those employees signing . . . [up] prior to the election . . . allows the union to buy endorsements and paint a false portrait of employee support . . ." 414 U.S. at 277. This Court recognized, however, that a union has a "legitimate" interest in waiving its usual initiaton fee where such waivers are "available not only to those who have signed up with the union before an election but also to those who join after the election." *Id.* at 274, fn.4.

In this case, the Union's established and communicated policy (App. 70, 75-76 at fn. 7) exempted all employees from the payment of initiation fees irrespective

of when they signed a card or otherwise attained membership status (App. 70). During the second election, anti-union employees falsely propagandized the issue of initiation fee payment to secure a "No" vote (App. 72-73). In refutation and clarification of any possible ambiguity concerning its policy of waiving initiation fees, the Union mailed to all employees who appeared on the "Excelsior List" the folowing statement:

> Q. WILL I HAVE TO PAY AN INITIATION FEE IF THE UNION IS VOTED IN?
>
> A. ABSOLUTELY NOT! ANYONE PRESENTLY WORKING AT REGENCY IS HEREBY GUARANTEED THAT THEY WILL NOT PAY ANY INITIATION FEE. (App. 77, 87-88)

2. There is no conflict in the circuits about a union's right to waive initiation fees for all employees who join before and after an election. The decision below is fully consistent with every other decision that has issued since *Savair*. In all cases where no impropriety was found, the announcement of the union, like that here, informed the employees that the waiver *would apply to all*. See *N.L.R.B.* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (C.A. 8), certiorari denied, No. 74-1381, October 6, 1975; *N.L.R.B.* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1313 (C.A. 6, 1975); *Altman Camera Co., Inc.* v. *N.L.R.B.*, 511 F.2d 319, 321-322 (C.A. 7, 1975); *N.L.R.B.* v. *Con-Pac, Inc.*, 509 F.2d 270, 272-273 (C.A. 5, 1975); *Thrift Drug* v. *N.L.R.B.*, 521 F.2d 243, 244 (C.A. 5, 1975); *N.L.R.B.* v. *Dunkirk Motor Inn*, 90 LRRM 2961, 2962 (C.A. 2, November 17, 1975); *N.L.R.B.* v. *Benner Glass Company*, 514 F.2d 641, 642 (C.A. 5, 1975); cf. *N.L.R.B.* v. *Stone & Thomas*, 502 F.2d 957, 958 (C.A. 4, 1974).

In this case the Union made an unqualified promise to waive initiation fees for all employees, including those who declined to join the Union until after the election. This even-handed Union conduct is certainly not the sort of pressure tactic that *Savair* meant to discourage. See *N.L.R.B.* v. *Bancroft Manufacturing Company, Inc.*, 516 F.2d 436, 444 (C.A. 5, 1975).

3. The approval by the court below of the action of the Board in setting aside the first election, likewise, presents no issue worthy of consideration here. The Board's ban on the use by any party of marked copies of the Board's sample ballot is of long standing and well publicized. This case presents no aspect of this issue which is new or important.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 27, 1976
Washington, D.C.

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1067

REGENCY ELECTRONICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATION LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 84-92) is reported at 523 F.2d 522. The decisions and orders of the National Labor Relations Board are reported at 198 NLRB 627 (Pet. App. 36-38), 200 NLRB 625 (Pet. App. 39-52), and 215 NLRB No. 157 (Pet. App. 66-83).

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1975 (Pet. 3). The petition for a writ of certiorari was filed on January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that a sample ballot that the company circulated before the first representation election warranted setting aside that election.

2. Whether the Board properly found that the union's offer to waive initiation fees did not warrant setting aside the second representation election.

STATUTE INVOLVED

The National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, as amended, 29 U.S.C. 151, *et seq.*, provides in pertinent part:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

STATEMENT

On December 17, 1971, pursuant to a representation petition filed by the Union,[1] the National Labor Relations Board conducted an election (hereinafter the "first election") among the employees at petitioner's plant; a majority of votes was cast against the Union. The Union filed objections to the election, alleging that on the day before the election the Company distributed to its employees a leaflet containing a facsimile of the Board's Sample Ballot, to which it added an X and a red heart on the "No" square (Pet. App. 7), thereby creating the impression that the Board endorsed the Company's position. Following an investigation, the Board set aside the first election and directed a new election (hereafter the "second election") (Pet. App. 19).

---

[1]International Union of Electrical, Radio and Machine Workers, AFL-CIO.

The second election, conducted on March 24, 1972, resulted in a vote of 133 to 112 in favor of the Union. The Company filed objections to the second election, in which it alleged, *inter alia*, that the Union had offered to waive initiation fees and dues, thereby interfering with the employees' free choice (Pet. App. 23-24). Following an investigation, the Board's Acting Regional Director recommended that the objections be overruled (Pet. App. 21-35). On August 1, 1972, the Board adopted this recommendation and certified the Union as the employees' bargaining representative (Pet. App. 36-38).

The Company thereafter refused to bargain with the Union; the Board, finding that the Company thereby violated Section 8(a)(5) and (1) of the Act, entered a bargaining order (Pet. App. 39-50). The Company sought review in the court of appeals, contending, *inter alia*, that the Board's order should be set aside because the sample ballot that the Company had distributed just before the first election had not interfered with that election.[2] The court of appeals enforced the Board's order, concluding, *inter alia*, that "the use of this type of information under the surrounding circumstances might have had an undesirable impact on the employees' freedom of choice" (Pet. App. 60).

While the Company's petition for rehearing was pending before the court of appeals, this Court announced its decision in *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, in which it held that a union's offer to waive initiation fees only of employees who sign authorization cards prior to an election impermissibly interferes with the employees' right to refrain from union activities and their statutory right to a free and fair election (*id.* at 277).

---

[2]The Company did not there challenge the Board's decision to overrule its objection to the Union's offer to waive initiation fees and dues.

Accordingly, the court of appeals remanded the case to the Board to conduct a hearing on the Company's objection to the Union's offer to waive initation fees and dues (Pet. App. 64-65).

On remand, the Board found that the Union had an established policy of exempting from payment of initiation fees *all* employees employed at the time of an election regardless of whether such employees joined the Union before or after the election (Pet. App. 70). The Board further found that, in the campaign preceding the first election, the Union distributed "charter membership" cards to employees who signed authorization cards (Pet. App. 76). The front of the cards contained the following language (Pet. App. 75):

IUE-AFL-CLC
CHARTER MEMBER (SEAL)
Exemption
from
Initiation
Fee

THIS CARD IS VALUABLE—KEEP IN YOUR WALLET

On the reverse side, the card read:

CHARTER MEMBERSHIP CARD
This is to certify that:

_____
(Name of Charter Member)

has, during an organizational drive at _____ located at _____ signed an authorization card signifying his desire to be a member of the International Union of Electrical, Radio and

Machine Workers, AFL-CIO. In bestowing membership on him, he is hereby exempt from payment of any initiation fee, now or at any future time, and will be listed as a charter member at the above plant.

_____ _____
Secretary-Treasurer International President

On March 9, 1972, fifteen days before the second election, the Union mailed a leaflet to all employees which stated (Pet. App. 77):

Q. WILL I HAVE TO PAY AN INITIATION FEE IF THE UNION IS VOTED IN?

A. ABSOLUTELY NOT! ANYONE PRESENTLY WORKING AT REGENCY IS HEREBY GUARANTEED THAT THEY WILL NOT PAY ANY INITIATION FEE.

The Board concluded that this leaflet clarified the Union's waiver policy, which properly applied to all unit employees, not only to those who signed cards prior to the election. Accordingly, the Board overruled the Company's objection and reaffirmed the bargaining order (Pet. App. 77-81, 82-83).

The court of appeals enforced the order, finding that the Board "considered all of the evidence including the charter membership cards in deciding that, taken in total context, the cards and other Union conduct did not amount to a *Savair* violation" (Pet. App. 90).

ARGUMENT

1. The Company contends (Pet. 8-13) that the Board's decision to set aside the first election because of the

Company's facsimile sample ballot was based on a rule first announced by the Board in *Allied Electric Products, Inc.*, 109 NLRB 1270 (1954);[3] and that such a rule is invalid because it was not promulgated in accordance with the rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 553(b) and (c). It is established, however, that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. * * * The Board's judgment that adjudication best serves this purpose is entitled to great weight." *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 294;[4] see also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765.

The Board correctly applied the *Allied Electric Products* principle to the instant case, where the distributed material was a facsimile of an official Board document, and was

[3]In that case, the Board set aside an election upon finding that reproduction by the union of altered copies of the Board's official ballot tended to interfere with employee free choice. The Board added that "in the future it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this rule." 109 NLRB at 1272 (footnotes omitted).

[4]The Company's reliance on *Morton* v. *Ruiz*, 415 U.S. 199 (Pet. 10-11), is misplaced. In *Ruiz* the Court held that the Bureau of Indian Affairs could not deny certain welfare benefits to Indians who lived off reservation, where the rule announcing this policy had been inserted in the Bureau's policy manual, but had been promulgated neither pursuant to the rulemaking provisions of the Administrative Procedure Act nor in the course of an adjudication. Here, however, there was an adjudicative basis for the rule at issue.

altered to give the appearance of favoring one of the parties to the election.[5] As the court of appeals observed (Pet. App. 58):

> It is beyond dispute that the duplicated ballot is identical in size and content with the Board's sample official ballot. It follows that here we are concerned with the Company's use of an official Board document in its flyer or leaflet. We do not have the use of a simulated or sketchy ballot or obvious propaganda statements in isolation from the official Board document. [Footnote omitted.]

2. Contrary to the Company's further contention (Pet. 15-17), the decision below does not conflict with *National Labor Relations Board* v. *Savair Manufacturing Co., supra.* There, this Court noted that the union's legitimate interest in waiving initiation fees could be preserved without election interference if the waiver were made available to all employees who join "the union before an election [and] also to those who join after the election." 414 U.S. 272-274, n. 4. Here, it is undisputed that the Union had an established policy of waiving initiation fees for all employees employed on the date of the election, irrespective of when they joined the Union. The Board and the court below correctly found that any misunderstanding that may have been caused by the Union's use of the term "charter member" or of charter membership cards was resolved by subsequent Union communications explaining that the waiver policy was available to all employees regardless of when they joined the Union (*supra*, p. 5).

[5]Compare *Clarytona Manor, Inc.*, 192 NLRB 781, enforced, 479 F. 2d 976 (C.A. 7), with *Rebmar, Inc.*, 173 NLRB 1434.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1976.

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MAR 25 1976

IN THE

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OCTOBER TERM, 1975

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NATIONAL LABOR RELATIONS BOARD,
and
INTERNATIONAL UNION OF ELECTRICAL,
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Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1067

REGENCY ELECTRONICS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC,

Respondents.

REPLY BRIEF FOR PETITIONER

The briefs of the Board[1] ("Bd. Br.") and the Union ("U. Br.") filed in opposition to the Company's Petition for a Writ of Certiorari ("Co. Pet.") are permeated with the philosophy that courts, and specifically this Court, must approve any action by the Board in deference to administrative discretion. However, the Board has not yet been granted any such legislative or judicial carte blanche to ignore applicable decisions of this Court or to ignore the dictates of the Administrative Procedure Act, 5 U.S.C. §§500-706 (1975) ("APA").

1 The designations of the parties and other abbreviations are the same as those utilized in the Company's Petition for a Writ of Certiorari.

ARGUMENT

I. The *Allied* Rule is Invalid and its Application in this Case Improper.

In its Petition, the Company argues that the Board announced the *Allied* rule in the adjudicatory proceeding of *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270 (1954) as a rule of general applicability and future effect. Thus, it was improper to apply the *Allied* rule in this case because the rule was not promulgated pursuant to the rule making provisions of the APA. (Co. Pet. 9-13) The Union does not challenge this argument. Rather, it states the issue is not "worthy of consideration" by this Court. (U. Br. 5) Such a casual approach to the Board's consistent refusal to follow the APA is echoed in the Board's brief.

The Board does not refute the fact that the *Allied* rule was announced in 1954 as a *new rule* of *general applicability* and *future effect*. The Board does not refute the fact that the APA defines such an "announcement" as a rule which must be promulgated pursuant to the APA. The Board offers no justification for its application of the unpromulgated *Allied* rule in this case as a rule of general applicability.

The only substantive argument urged by the Board is that the choice between rule making and adjudication lies in the first instance within the Board's discretion. (Bd. Br. 6) The Company agrees and so stated in its Petition. (Co. Pet. 9) What the Board fails to recognize is that it has discretion *only* to decide whether to proceed by a general rule or by ad hoc adjudication. If the Board decides to announce a general rule, it may only do so by promulgating the rule pursuant to the APA. The Board *does not* have the discretion to promulgate a general rule in an adjudicatory proceeding. This is exactly what the Board attempted to do with its *Excelsior* rule, an approach which was condemned by this Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The single most significant aspect of the Board's brief is that it proves the Company's contention that the Board intends to continue ignoring both the decisions of this Court in *Wyman-Gordon* and *Morton v. Ruiz*,[2] 415 U.S. 199 (1974),

2 The Board's statement of the basis upon which this Court decided Ruiz is incorrect. (Bd. Br. 6 n. 4) Even if the Bureau of Indian Affairs had announced its rule in an adjudication rather than inserting it in its policy manual, it nevertheless was a rule of general applicability and future effect and the result in Ruiz would have been the same. This Court repeatedly stressed that the BIA's rule should have been promulgated pursuant to the APA. (415 U.S. at 231-36)

as well as the dictates of the APA. It must be acknowledged that the *Wyman-Gordon* decision expressed no preference for general rules over ad hoc adjudication. It is equally clear, however, that *Wyman-Gordon* requires that if an administrative agency decides to announce a rule of general applicability and future effect it may only do so by promulgating the rule pursuant to the APA. Note, *Rule-Making and Adjudication in Administrative Policy Making:* NLRB v. Wyman-Gordon Co., 11 B.C. Ind. & Com. L. Rev. 64 (1969). The Board erroneously combines these two principles into a single proposition that the Board, unlike every other administrative agency, can announce a rule of general applicability and future effect in an adjudicatory proceeding. Unlike *Wyman-Gordon*[3] or *H. & F. Binch Co. v. NLRB*, 456 F. 2d 357 (2nd Cir. 1972),[4] this is an appropriate case for this Court to administer the "one kind of medicine the Board will have no difficulty in understanding." (456 F. 2d at 365)

II. The Board Failed to State the Basis for its Order or Make Sufficient Findings.

Neither the Board nor the Union have responded to the Company's argument on this issue. Thus, the Board's failure in this case to comply with the dictates of *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) stands unchallenged.

III. The Decision of the Court of Appeals in *Regency II* is in Direct Conflict with this Court's *Savair* Decision.

In its Petition, the Company argues that the Union's use of charter membership cards violated this Court's proscription against contingent waivers of initiation fees. *NLRB v.*

3 As a matter of procedure, the Board's result was affirmed even though an unpromulgated, and thus invalid, rule was involved.

4 Proceeding by ad hoc adjudication, rather than rule making, deemed appropriate.

Savair Manufacturing Co., 414 U.S. 270 (1973). (Co. Pet. 15-17) The Board and the Union attempt to avoid meeting this argument by alluding to the Union's leaflet distributed to the Company's employees on March 9, 1972. (Bd. Br. 5, 7) (U. Br. 3-5) However, neither the Board nor the Union explain how that leaflet removed the concerns expressed in *Savair*. By the time the leaflet was distributed, as many as 50 employees had been charter members for over three months. For over three months those charter members had painted a false portrait of employee support for the Union. For over three months a moral obligation to vote for the Union had been engrained in the charter members. A leaflet distributed at the height of an election campaign when the employees were being inundated with propaganda, simply cannot erase the harmful effects of the Union's admitted *Savair* violation.

The *Savair* decision suggests a way of dramatizing the inadequacy of the Union's March 9 leaflet:

> "An employer who promises to increase the fringe benefits by $10 for each employee who votes against the union, if the union loses the election, would cross the forbidden line under our decisions." (414 U.S. at 278)[5]

If the Company in this case had engaged in conduct similar to the Union's, it too would have crossed the "forbidden line." For example, assume the Company had decided to give all employees a $10.00 bonus before it had any knowledge of union activity. The Company thus had an established bonus policy which could have been legally implemented even after the Company learned of the union activity.[6]

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5 Legal commentators have suggested that this statement and the accompanying discussion by the Court form the main basis for the Savair decision, *i.e.*, a union should be forbidden to dispense benefits in order to "buy" votes just as employers are forbidden. *See, e.g.*, Smither, *Does the Goalpost Move When Employers Kick About Union Misconduct During Elections?*, 25 Lab. L.J. 578 (1974); Note, 41 Brooklyn L.R. 153 (1974); and Note, 6 St. Mary's L.J. 250 (1974).

6 This hypothetical Company policy would thus be like the Union's "established policy" of exempting all employees from the payment of initiation fees, as asserted and relied upon by the Board (Bd. Br. 4) and the Union (U. Br. 5, 6). The Company *does not* contend that such a policy violates Savair. What the Company *does* contend is that the Union's use of charter membership cards did not reflect that unannounced Union policy and thus did violate Savair. Further, the Union's reliance upon its inconsistent "established policy" at best serves to demonstrate that the charter membership cards constituted a blatant misrepresentation of that policy in violation of NLRB v. Gorbea, Perez & Morell, S. en C., 328 F. 2d 679 (1st Cir. 1964). Even the dissenting Justices in Savair would have found the Union's conduct in this case objectionable. (414 U.S. at 283)

Assume further, however, that once the Union started its organizing effort, the Company decided to illegally implement its otherwise lawful bonus through the guise of Company charter memberships and, three months prior to the election, distributed the following cards to certain pro-Company employees:

FRONT

COMPANY CHARTER MEMBER.
ENTITLED TO $10.00
THIS CARD IS VALUABLE—
KEEP IN YOUR WALLET.

BACK

COMPANY CHARTER
MEMBERSHIP CARD

This is to certify that Jane Doe has, during an organizational drive at the Company, signed a Company membership card signifying her desire to be a member of the Company team. In bestowing membership on her, she is hereby promised $10.00 and will be listed as a Company Charter Member.

(The Union's charter membership card is at pages 6 and 7 of the Company's Petition.)

Also assume that as the election campaign drew to a close, the Company distributed a leaflet in the following form:

Question: If I haven't signed a Company membership card, can I still vote for the Company?

Answer: Yes you can. Signing a card has nothing to do with how you vote. Your vote will be cast in secret and you can vote for the Company regardless of whether or not you signed a card.

Question: Will I receive $10.00 if the Union is voted out?

Answer: Absolutely yes! Anyone presently working at the Company is hereby guaranteed they will receive $10.00.

(Similar questions and answers in the Union's leaflet are at page 16 nn. 6 and 7 of the Company's Petition.)

Even if this subsequent leaflet somehow explained the meaning of the Company charter membership cards, it would be insufficient to pull the Company back across the forbidden line. Actually, the leaflet only compounds the offense. What it really tells the employees is that it is still not too late for non-charter members to join the Company team and receive their $10.00.

The Union's charter membership cards and the leaflet distributed on March 9, 1972, had this same effect. The Board in this case should have followed the *Savair* decision and honored "the right of those who oppose a union as well as those who favor it." (414 U.S. at 278)

CONCLUSION

For the reasons stated in the petition and this reply brief, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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